SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 862

THE UNITED STATES, PETITIONER

vs.

JOHN J. FELIN & CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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727378—47——1

1 In the Court of Claims of the United States

No. 45892

JOHN J. FELIN & CO., INC., A CORPORATION

v.

UNITED STATES OF AMERICA

Plaintiff's petition

Filed June 24, 1943

To the Honorable the Judges of the United States Court of Claims:

The petition of John J. Felin & Co., Inc. respectfully shows that:

I

Petitioner is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with packing plant and place of business at 4142 Germantown Avenue, Philadelphia, Pennsylvania.

Petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

2 II

On March 3, 1943, the following property owned by and in the possession of the petitioner at its place of business was taken under a requisition order by and for the use of the United States and was thereafter retained by and used for the purposes of the United States, and petitioner was thereby and thereafter deprived of all said property, its use and its value:

40,000 pounds cured regular hams, bone in, 14–18 pound range.

40,000 pounds cured pork bellies, square cut and seedless, 10–12 pound range.

15,000 pounds cured pork picnics, bone in, 10–14 pound range.

30,000 pounds salted pork fatbacks, cured, 8–12 pound range.

This taking of petitioner's property was under a requisition order (No. F. D. A. 100) dated March 1, 1943, signed by Roy F. Hendrickson, Director, Food Distribution Administration, United States Department of Agriculture, and issued by him, as delegate of the Secretary of Agriculture, by virtue of the order of the President of the United States dated December 5, 1942 (Exec. Order No. 9280, para. 8c, para. 9, Fed. Reg. Vol. 7, p. 10179), and

the authority of the President under the Act of October 16, 1941, as amended (Chap. 445, 55 Stat. 742).

III

Following the the taking of its property as aforesaid, petitioner was served with a "Notice of Requisition" dated March 23, 1943, signed by Ralph W. Olmstead, Deputy Director, Food Dis-
3 tribution Administration, United States Department of Agriculture, and directed to file a claim for the requisitioned property with Livestock and Meats Branch, Food Distribution Administration, United States Department of Agriculture, Washington, D. C.; and thereafter, on or about March 27, 1943, petitioner filed its claim for just and reasonable compensation. Under date of May 7, 1943, the aforesaid Roy F. Hendrickson, as Director, Food Distribution Administration, United States Department of Agriculture, issued and served upon petitioner a "Notice of Preliminary Determination" which stated certain amounts as "fair and just compensation" for the requisitioned hams, bellies, picnics, and fatbacks aggregating $25,112.50.

To this Preliminary Determination petitioner filed with the Food Distribution Administration on or about May 15, 1943, its objections and asserted that payment in the amounts determined "would deprive the company of its property without just compensation in violation of the Fifth Amendment of the Constitution of the United States"; and, further, that fair and just compensation as required by the Fifth Amendment was not less than $31,637.50. Notwithstanding petitioner's showing as made in its objections to the Preliminary Determination and in its original claim filed with the Food Distribution Administration, said Roy F. Hendrickson, under date of May 22, 1943, made the following order:

4 WAR FOOD ADMINISTRATION

FOOD DISTRIBUTION ADMINISTRATION

WASHINGTON, D. C.

Requisition No. FDA-100.

AWARD OF COMPENSATION FOR PROPERTY REQUISITIONED UNDER THE ACT OF OCTOBER 16, 1941, AS AMENDED

The Director of Food Distribution, pursuant to the Act of October 16, 1941, as amended, and the Executive orders and regu-

lations thereunder, hereby makes the following award of compensation with respect to the property described below which was requisitioned by the United States:

DESCRIPTION OF PROPERTY

40,000 pounds cured regular hams, bone in, 14–18 pound range.
40,000 pounds cured pork bellies, square cut and seedless, 10–12 pound range.
15,000 pounds cured pork picnics, bone in, 10–14 pound range.
30,000 pounds salted pork fatbacks, cured, 8–12 range.

AMOUNT OF COMPENSATION

Twenty-five thousand, one hundred and twelve, and 50/100 ($25,112.50) dollars (aggregate amount).

PERSON ENTITLED TO COMPENSATION

John J. Felin & Co., Inc., 4142 Germantown Avenue, Philadelphia, Pennsylvania.

(S) ROY F. HENDRICKSON,
Director of Food Distribution.

WASHINGTON, D. C., May 22, 1943.

5 IV

Petitioner was and is unwilling to accept as fair and just compensation for the said requisitioned meat products the amount of $25,112.50 and petitioner has failed to receive the fair and just compensation to which it is entitled under the Act of October 16, 1941, as amended, and under the Fifth Amendment to the Constitution of the United States.

V

On or about May 22, 1943, Food Distribution Administration issued its voucher to petitioner relating to the said requisitioned meat products in the amount of $12,556.25, being payment of one-half of the award aforesaid as provided by the terms of the Act of October 16, 1941, as amended, in cases where the owner of property requisitioned is unwilling to accept the award as fair and just compensation and petitioner has received from the United States the amount of $12,556.25 and has credited the amount against its claim for fair and just compensation.

VI

The fair and reasonable value of the property requisitioned and taken by the United States as aforesaid and of which petitioner was deprived on March 3, 1943, was $31,637.50. Credit in the amount of $12,556.25 for the payment received by petitioner as aforesaid, leaves the sum of $19,081.25, with interest, as that to which petitioner is justly entitled, after all just credits and offsets, as the fair and just compensation.

6 VII

No other action than that herein described has been taken on petitioner's claim in any government department or in Congress; no person other than petitioner is the owner of the claim herein asserted or has any interest therein; and no assignment or transfer of this claim or any part thereof or interest therein has been made.

Wherefore, petitioner prays judgment against the United States of America for the sum of Nineteen Thousand Eighty-one Dollars and Twenty-five cents ($19,081.25), together with interest and its costs herein expended.

CLARK & LA ROE,
Attorneys for Petitioner,
Investment Building, Washington 5, D. C.

JUNE 23, 1943.

[*Duly sworn to by George A. Carey; jurat omitted in printing.*]

7 *General traverse*

Filed August 3, 1943

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANCIS M. SHEA,
Assistant Attorney General.

M. K. F.
E. E. E.

Argument and submission of case

On June 4, 1946, the case was argued and submitted on merits by Mr. Arthur L. Winn, Jr., for plaintiff, and by Miss Mary K. Fagan for defendant.

9 *Special findings of fact, conclusion of law, and opinion of the court by Whitaker, J.*

Filed October 7, 1948

Mr. Arthur L. Winn, Jr. for the plaintiff. Messrs. Wilbur LaRoe, Jr., and Frederick E. Brown were on the brief.

Miss Mary K. Fagan, with whom was Mr. Assistant Attorney General John F. Sonnett, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. The plaintiff, a corporation having its principal office in Philadelphia, Pennsylvania, is and for many years has been engaged in the business of packing pork products. It buys hogs in the Chicago, St. Louis and Indianapolis markets and transports them to Philadelphia where the hogs are slaughtered and converted into various pork cuts and products. The plaintiff is a wholesaler and sells and distributes its products through trucks maintained by it to retail dealers in the metropolitan area of Philadelphia.

2. On December 5, 1942, the President of the United States issued Executive Order No. 9280 by which he authorized and directed the Secretary of Agriculture to assume full responsibility for and control over the Nation's food program in order to assure an adequate supply and efficient distribution of food to meet war and essential civilian needs. Among other things, the Secretary of Agriculture was authorized by this Order to assign food priorities and to make allocations of food for human and animal con-
10 sumption to Government agencies and for private account and to purchase and procure food for such Government agencies.

3. During February and March 1943, the Food Distribution Administration, an agency of the Department of Agriculture, was in charge of procuring meat for various Departments and Government agencies, which required it for shipment under the Lend-Lease program authorized by the Act of March 11, 1941. It had the authority to issue priority orders which had the effect of requiring packers to fill its orders prior to the filling of other orders and it procured meat by issuing to each packer operating under Federal inspection a priority order calling for delivery of a proportionate part of the total quantity needed at the time. Each packer's quota was based on the ratio of meat produced in

his plant to the total production in all Federally inspected packing plants.

4. On February 2, 1943, the Food Distribution Administration sent plaintiff a priority order requesting it to deliver 225,000 pounds of lard and pork products, which are hereinafter described, to the Federal Surplus Commodities Corporation, an agency of the United States Government, for delivery under the Lend-Lease program. The order, known as a purchase order, stated that plaintiff would be paid the ceiling prices applicable under provisions of the Office of Price Administration regulations, and that plantiff was required to fill the order in preference to any other contract or purchase order of lower or no priority rating.

5. Prior to the receipt of the purchase order, plaintiff had supplied pork products to several Government agencies. By February 2, 1943, however, plaintiff had decided it could no longer afford to sell at the prices offered by Government agencies. Accordingly, plaintiff refused to make delivery and on March 1, 1943, the Director of the Food Distribution Administration, acting under the authority of Executive Order No. 9280 and specific authorization of the Secretary of Agriculture, made a determination pursuant to the Act of October 16, 1941 (55 Stat. 742), that it was necessary to requisition the property from plaintiff. The requisition was issued on March 1, 1943, and on March 3, 1943 the United States took title and possession of the following described
11 property which was owned by plaintiff and was then located at its packing house in Philadelphia, Pennsylvania:

40,000 pounds Cured Regular Hams, 14 to 18 lb. range.
40,000 pounds Cured Clear Bellies, 10 to 14 lb. range.
15,000 pounds Cured Picnics, 6 to 10 lb. range.
30,000 pounds Salted Fatbacks, 8 to 12 lb. range.
100,000 pounds Refined Pure Lard, 1 lb. prints (30 lbs. to carton).

6. On March 24, 1943, plaintiff was directed to file proof of claim with the Food Distribution Administration, Washington, D. C. On the same day, plaintiff prepared and promptly thereafter filed its claim, stating that fair and just compensation for the property requisitioned was the sum of $55,525.00, which included $16,250 for the lard and $39,275 for the pork cuts. Plaintiff claimed that $39,275 was the cost of replacing the pork cuts and that the figure was arrived at on the basis of a live hog cost of $15.90 per cwt., at Chicago, Illinois, on the date of the requisition. Plaintiff also claimed that the ceiling prices provided for in applicable regulations of the Office of Price Administration (the prices offered by defendant) were less than fair and just

compensation for the property because such ceiling prices were based upon a live hog cost at Chicago of $13.15 per cwt.

7. On May 7, 1943, the Director of the Food Distribution Administration made a preliminary determination that fair and just compensation for the property requisitioned from plaintiff was the sum of $40,656.28, including $15,543.78 for the lard and $25,112.50 for the pork cuts. The amount determined was computed at the ceiling prices authorized by Revised Maximum Price Regulation No. 148 of the Office of Price Administration for sale at wholesale of such products in carload quantities at Philadelphia, Pennsylvania.

8. On May 8, 1943, plaintiff received notice of the preliminary determination and on May 15, 1943, wrote the Office of Food Distribution accepting the award for the lard but objecting to the value determined for the pork cuts on the ground that it was less than the cost of producing or replacing the property.

9. On May 22, 1943, the Director of the Food Distribution Administration made a final award for the pork cuts, sepa-
12 rately from the lard, which was in the sum of $25,112.50. This was in the same amount as the preliminary award and in the letter by which plaintiff was advised of this action it was stated that the preliminary award could not be increased because the Government could not pay more than the ceiling prices fixed by regulations of the Office of Price Administration.

10. Since plaintiff refused to accept the amount awarded as the value of the pork cuts, plaintiff was paid fifty percent thereof or $12,556.25. Plaintiff accepted and was paid the full amount awarded as compensation for the lard. References in succeeding findings to the property requisitioned from plaintiff do not include the lard taken by defendant.

11. At the time its property was requisitioned, the price at which plaintiff could sell wholesale pork cuts was fixed by regulations issued by the Office of Price Administration, but there were no price regulations governing the sale of live hogs until September 11, 1943, when Maximum Price Regulation No. 469, establishing ceiling prices for live hogs, was issued. The principal item in the cost of producing products sold by plaintiff was the amount it had to pay from time to time for live hogs.

12. Price ceilings on the sale of dressed hogs and wholesale pork cuts were first established on March 9, 1942. On that date the Administrator of the Office of Price Administration, pursuant to the Emergency Price Control Act of 1942 and Executive Orders issued thereunder, issued Temporary Maximum Price Regulation No. 8 which became effective March 23, 1942. This

regulation was superseded on May 20, 1942, when Maximum Price Regulation No. 148 was issued. On October 24, 1942, the Price Administrator issued Revised Maximum Price Regulation No. 148 covering dressed hogs and wholesale pork cuts which became effective November 2, 1942, and Amendment No. 1 thereof went into effect January 19, 1943. On March 3, 1943, the date plaintiff's property was requisitioned, all sales of pork cuts and pork products at wholesale were governed by the provisions of Revised Maximum Price Regulation No. 148 and Amendment 1 thereto.

Each of the regulations referred to above established as the
13 maximum prices for dressed hogs and wholesale pork cuts, the prices prevailing with respect thereto during the period March 3, 1942, to March 7, 1942, inclusive.

13. Chicago, Illinois, is one of the largest hog markets in the country and is the place where most transactions between large buyers of meat products occur. Chicago market quotations are the basic quotations in the packing industry and are generally used for arriving at prices on hogs and pork products in other market centers. During the period from March 3 to March 7, 1942, which was the base period of the price regulations referred to in the preceding finding, the average price of live hogs at Chicago was $13.15 per cwt. However, the price of live hogs began to rise soon after the issuance of Temporary Maximum Price Regulation No. 8 and did not decline to the level prevailing during the base period mentioned at any time thereafter in 1942 or 1943. In April 1942, the first full month in which price ceilings were in effect on wholesale pork cuts, the Chicago average price rose to $14.03. The price trend continued upward, and although there was a price decline during the heavy marketings in November and December 1942, the price started rising again in the latter part of December 1942 and reached an average of $15.59 per cwt. during March 1943. For the week ending March 6, 1943, the Chicago average live hog price was $15.60 per cwt., the highest price level attained since October 1920.

14. During the months of February and March 1943 the wholesale prices for products derived from live hogs were, as shown by the published reports of the Department of Agriculture, less than the market prices of live hogs. On April 10, 1943, the War Food Administrator, to whom the President had transferred the powers and functions theretofore granted to the Secretary of Agriculture under Executive Order No. 9280, issued an official press release in which reference was made to the continued "squeeze" between the price of live animals and the wholesale prices of products. The release read in part as follows:

"(1) Current prices for livestock are above the levels reflecting a proper relationship to the existing wholesale meat ceil-
14 ings. The Administration does not contemplate any change in the level of either wholesale or retail meat ceilings.

"The meat rationing program, together with the vigorous enforcement measures which are designed to keep meat supplies moving through legitimate trade channels, will have the effect of bringing about a better balance between available supplies and civilian, military, and other requirements. This is expected to result in lower prices for all classes of livestock as these programs become fully effective.

"However, if these measures do not result in a downward adjustment in hog prices in a reasonable time, it will be necessary to adopt ceiling prices on live hogs. In view of the exceptionally acute situation resulting from present relatively high hog prices, procedures for placing ceiling prices on hogs are now being worked out for use if and when necessary. Recent hog prices have been $1.00 to $1.50 per cwt. above levels reflected by current wholesale pork ceilings."

15. Average live hog prices at Chicago declined somewhat in the months of May, June, and July, 1943, but they began to increase again during the latter part of August of that year and Maximum Price Regulation No. 469 was issued on September 11, 1943. It established ceiling prices on the sale of live hogs effective October 4, 1943. In the statement of considerations involved in the issuance of this regulation the Price Administrator, after referring to the several regulations fixing ceiling prices on wholesale pork cuts and the rise in hog prices since March 1942, stated in part as follows:

"However, the hog price continued to rise, the average reaching $14.99 in August, with a top of $15.30. It became clear that this increase was causing some packers to sell at a loss under their wholesale pork ceilings and that, if prices continued to rise, or even remained at August levels, many pork slaughterers would be forced sharply to curtail their kill or to discontinue it entirely. With the increased runs of the late fall, the hog price declined; but in late December it began again to rise, reaching an average of $15.59 per hundredweight for the month of March 1943, with some hogs selling in excess of $16 during that month. During the months of May, June, and July, 1943, the hog price was low enough to permit slaughterers to make a profit; but in early August another price rise threatened to efface slaughterers' margins. Once more the price reached $15 per hundredweight.

15 "Although it is true that the seasonal nature of livestock marketing has made periods of loss a commonplace in the

packing industry, it is also true that slaughterers generally are able to balance seasonal losses with profits at other times. Many slaughterers who suffered losses during the first three months of 1943 have undoubtedly recouped those losses during May, June, and July. The Administrator has long hoped that the indirect controls previously imposed—wholesale and retail price ceilings, rationing, and slaughter restrictions—would be sufficient. The sharp fluctuations in live hog prices indicate, however, that although each of the existing indirect controls is partially effective, and hence valuable in itself, they may be insufficient in the aggregate to assure the continuance of hog prices properly related to the wholesale pork price structure. Moreover, excessive fluctuations in hog prices from season to season raise serious production problems for many firms and tend to impede the effective operation necessary for the prosecution of the war. To remove the threat of repeated crises, to permit necessary stability in the operations of the industry, and to assure the continuance of hog prices properly related to wholesale pork ceilings, the Administrator deems it necessary to place a fixed upper limit on the range of fluctuation of live hog prices. This action is also necessary to prevent hog price increases from dislocating grain distribution."

16. Plaintiff was a member of the National Independent Meat Packers Association, an organization of approximately 650 meat packing companies, which on several occasions in 1942 and 1943 protested to the Office of Price Administration against the maximum prices at which the packers were allowed to sell wholesale pork cuts under price regulations then in effect. In the Emergency Price Control Act of 1942 and in regulations issued by the Price Administrator, a procedure was provided for filing protests to regulations issued by the Price Administrator. On July 17, 1942, plaintiff filed a written protest to Maximum Price Regulation No. 148 with the Price Administrator and again on March 18, 1943, plaintiff filed with the Price Administrator a written protest to Revised Maximum Price Regulation No. 148.

17. Orders and accompanying opinions denying the protests filed by plaintiff were entered by the Price Administrator on
16 April 23, 1943 and July 5, 1943. Plaintiff did not attempt to have these decisions of the Price Administrator reviewed by the Emergency Court of Appeals as authorized by the Emergency Price Control Act of 1942, and did not file any complaints in that Court after the orders denying plaintiff's protests were entered.

18. The requisition of plaintiff's property occurred at a time when there was an acute shortage of pork products available for the civilian population. In addition to a greatly increased civilian

demand, large quantities of pork and other meat products were being purchased by Government agencies for war uses. As a result, offerings on the market of pork products, particularly of the better cuts of pork, were considerably below normal, and supplies available for the general trade were far short of the demand. The Food Distribution Administration was having difficulty in obtaining its requirements and on March 13, 1943, the Director of that agency issued an order which required each slaughterer operating under Federal inspection to set aside for war uses 45% of all pork and designated percentages of other meat derived from the slaughter of hogs and other livestock.

19. Plaintiff attempted to replace the property taken by defendant by purchasing pork cuts in the market but was unable to do so. The only means of replacement available to plaintiff was through the purchase and slaughter of live hogs and this was the method which plaintiff customarily followed during 1942 and 1943. The replacement cost of the property requisitioned by defendant at the time and place of the taking was the sum of $30,293.00. This figure is based on the cost of live hogs prevailing at that time, plus the cost of slaughtering and converting them into pork cuts.

20. At the time plaintiff's products were requisitioned there was a ready market for such products in Philadelphia. The prevailing market prices were the maximum prices established by Revised Maximum Price Regulation No. 148. Prior to and after the date of the requisitioning, plaintiff regularly sold pork cuts and other pork products in this market at the established ceiling prices. Such prices were the only legal prices at which plaintiff could dispose of its products. Throughout the period
17 mentioned, plaintiff continued to buy live hogs at prevailing prices and to sell pork products derived from them at the ceiling prices authorized by regulations of the Office of Price Administration, even when the cost of live hogs was greater than the wholesale prices of the products obtained from them. Plaintiff chose to do this in order to protect its good will and the investment in its business, in order to supply customers who were dependent on it and in order to retain its organization of plant and company employees at a time when the labor situation in Philadelphia was very tense.

21. The ceiling price of the requisitioned property when sold at wholesale in carload quantities at Philadelphia, Pennsylvania, on March 3, 1943, was $25,112.50.

22. As heretofore stated, the purchase order and requisition issued by defendant called for the delivery of plaintiff's pork cuts in carload quantities, whereas plaintiff customarily sold such prod-

ucts in lots of less than 500 pounds each. Plaintiff's customers, approximately 5,000 in number, are retail meat dealers located in the Philadelphia area, whom plaintiff serves by means of 57 route trucks. The ceiling price of the requisitioned property when sold at wholesale in lots of 500 pounds or less in Philadelphia at the time of the taking was $26,362.50. The excess of this figure over the amount mentioned in the preceding finding results from the fact that the provisions of Revised Maximum Price Regulation No. 148, which established the market price, authorized a deduction of $1.00 per cwt. for sales at wholesale in carload quantities. The $1.00 differential was intended to partially defray the expense incurred for delivery and sale in less than carload quantities.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover $17,736.75.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of seventeen thousand seven hundred thirty-six dollars and seventy-five cents ($17,736.75).

18 *Opinion*

WHITAKER, Judge, delivered the opinion of the court:

On March 1, 1943, the defendant requisitioned from plaintiff 225,000 pounds of meat and pork products. It offered to pay therefor the ceiling price fixed by the Office of Price Administration, but on plaintiff's refusal to accept this amount, it paid plaintiff one-half of it, as required by law. Plaintiff now sues for the difference between this amount and what it says is just compensation.

Plaintiff says that the best measure of just compensation in this case is what it cost to replace the products taken. The defendant says that the market price is the proper measure and that, since the highest price which plaintiff could have obtained for these goods on the market was the ceiling price fixed by the Office of Price Administration, this is the amount that is just compensation.

We have heretofore held that the market price is not always the measure of just compensation,[1] and we do not think it is in this case.

The defendant does not deny that the ceiling price fixed by the Office of Price Administration was lower than the cost of produc-

[1] Alexander D. Walker, et al v. United States, 105 C. Cls. 553. Cf. Coombe v. United States, 106 C. Cls. 402, decided June 3, 1946. See United States v. General Motors Corp., 323 U. S. 373, 379.

tion, but it, nevertheless, says that since plaintiff would have received no more for these goods had it sold them to its customers than the amount the defendant paid it, less the less-than-carload-lot differential, plaintiff's pecuniary position has been made no worse by the requisition of them and the payment of the ceiling price, and that, therefore, the payment of the ceiling price is the extent of its obligation.

It is true that the cases hold that when property is taken the owner must be put in as good position pecuniarily as he was in before his property was taken. Seaboard Air Line Ry. Co. et al. v. United States, 261 U. S. 299; Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 125; United States v. Miller, 317 U. S. 369, 374; Alexander D. Walker, et al. v. United States, supra. But defendant goes further than this and says that this is the
19 extent of its obligation. Whether or not this is so in all cases, we do not need to decide. For the purposes of this decision we shall assume that this is the extent of its obligation. But, even so, the payment to plaintiff of the ceiling price did not put it in as good position pecuniarily as it was in before its property was taken. This is so because plaintiff had to replace the articles taken, and it could not do so at the price paid it. Plaintiff felt obliged to furnish its customers a certain amount of products, although at a loss, in order to retain their good will and to provide employment for its employees, and thus hold its organization together; but it kept on hand only enough goods to supply its customers with the minimum they could get along on; hence when defendant took its goods it was necessary for plaintiff to replace them, in order to supply its customers.

To do so, plaintiff undertook first to buy these products on the market, but it was unable to do so at the ceiling price. It was, accordingly, necessary for it to go into the market and purchase live hogs and process them and deliver the products to its customers. Since the price of live hogs had risen from $13.15 per cwt., the price at the time the OPA price was fixed, to $15.60 per cwt., it cost plaintiff more to replace the pork products than what the defendant had paid it and more than what it could obtain for them at the ceiling price fixed by the Office of Price Administration. When the Government took them it paid plaintiff less than what it had cost it to acquire them, and then when plaintiff had to replace the products and sell them at the OPA ceiling price, it sustained another loss. As a result of the requisition, therefore, plaintiff has sustained a loss on two transactions instead of one.

Defendant, of course, as a wartime measure, has the right to fix a maximum price at which goods can be sold; but when it takes a citizen's property it is obligated to justly compensate him there-

for. As a general rule, it has not justly compensated him unless it pays him an amount sufficient to take care of the loss it inflicts on him as a result of the taking of his property. United States v. New River Collieries, 262 U. S. 341. Or, applying the rule, that the Government is obligated to put the citizen in the same pecuniary position as he was in before his property was taken, to
20 a case where plaintiff must replace the property taken—in such case the defendant must give plaintiff enough money to enable it to buy other property in place of that taken without sustaining a loss.

We have found that the cost of replacing the property taken was $30,293.00. In order to put plaintiff in the same condition it was in before its property was taken, the defendant will have to pay it the sum of $30,293.00.

By what we have said we must not be understood to imply that the ceiling price is the measure of just compensation when it is not necessary for the owner to replace the property taken. That case is not before us. See Walker v. United States, supra.

Defendant in its brief says that plaintiff's suit is an indirect attack on the Maximum Price Regulations and that such an attack can be made only before the Emergency Court of Appeals. This is clearly incorrect.

These regulations forbade plaintiff to sell its goods at higher than ceiling prices; but plaintiff has not sold its property to the Government; its property has been taken by the Government. In such case plaintiff is clearly entitled to demand the price the Constitution says it is entitled to. There is nothing in the Price Control Act which prevents it from making this demand in this tribunal. Plaintiff neither attacks the validity of the regulations nor does it seek to violate them.

Plaintiff has been paid for the pork products taken the sum of $12,556.25. The cost of replacing them was $30,293.00. Plaintiff is entitled to recover a judgment for the difference of $17,736.75. Judgment for this amount will be entered. It is so ordered.

JONES, Judge; LITTLETON, Judge; and WHALEY, Chief Justice, concur.

MADDEN, Judge, took no part in the decision of this case.

21 *Order of Court Relative to Judgment*

October 7, 1946

ORDER

On the court's own motion the conclusion of law is amended to read as follows:

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover $17,736.75. Plaintiff is also entitled to recover as a part of just compensation interest at the rate of 4 per centum per annum of $12,556.25 from March 3, 1943, to May 22, 1943, and on $17,736.75 from March 3, 1943, to date of payment.

It is, therefore, ordered and adjudged that the plaintiff recover of and from the United States the sum of seventeen thousand seven hundred thirty-six dollars and seventy-five cents
23 ($17,736.75), plus interest at 4 per centum from March 3, 1943, to May 22, 1943, on $12,556.25, and on $17,736.75 from March 3, 1943, to the date of payment, not as interest but as a part of just compensation.

The concluding paragraph of the opinion is modified accordingly. The findings of fact will stand.

By the Court.

RICHARD S. WHALEY,
Chief Justice.

OCTOBER 7, 1946.

25 *Judgment of the Court*

October 7, 1946

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover $17,736.75. Plaintiff is also entitled to recover as a part of just compensation interest at the rate of 4 percentum per annum on $12,556.25 from March 3, 1943 to May 22, 1943, and on $17,736.75 from March 3, 1943 to date of payment.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of seventeen thousand seven hundred thirty-six dollars and seventy-five cents
27 ($17,736.75), plus interest at 4 per centum from March 3, 1943 to May 22, 1943 on $12,556.25, and on $17,736.75 from March 3, 1943 to the date of payment, not as interest but as a part of just compensation.

29 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1947

Supreme Court of the United States 16

No. 862, October Term, 1946

Order allowing certiorari

Filed March 3, 1947

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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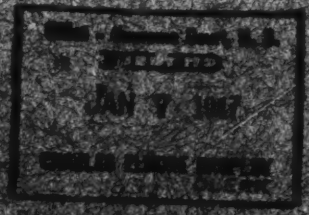

No. [redacted] 17

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES, PETITIONER,

v.

JOHN J. PERRY & CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 862

THE UNITED STATES, PETITIONER

v.

JOHN J. FELIN & CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on October 7, 1946.

OPINION BELOW

The opinion of the Court of Claims (R. 12–14) is reported at 67 F. Supp. 1017.

JURISDICTION

The judgment of the Court of Claims was entered on October 7, 1946 (R. 15). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether in a suit for just compensation by the owner of meat and meat products requisitioned by the United States in the exercise of its wartime powers, the actual market price or the replacement cost was the proper measure of just compensation where the market price, which was the maximum applicable price as fixed by the Office of Price Administration, was less than the owner's cost of replacement.

STATUTE INVOLVED

The pertinent portion of the Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, the Act of June 30, 1943, c. 181, 57 Stat. 271, the Act of June 28, 1944, c. 307, 58 Stat. 624, and the Act of June 30, 1945, c. 208, 59 Stat. 271 (50 U. S. C. App., Supp. V, 721) provides as follows:

> Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1946, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such

property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., Title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property.

STATEMENT

Respondent, a corporation, is and for many years has been, engaged in the business of packing pork products. It buys hogs in the Chicago, St. Louis, and Indianapolis markets and transports them to Philadelphia where the hogs are slaughtered and converted into various pork cuts and products. Respondent is a wholesaler and sells and distributes its products through trucks maintained by it to retail dealers in the metropolitan area of Philadelphia (R. 5).

On December 5, 1942, the President of the United States issued Executive Order No. 9280, authorizing and directing the Secretary of Agriculture to assume full responsibility for and control over the Nation's food program in order to assure an adequate supply and efficient distribution of food to meet war and essential civilian needs, to assign food priorities, to make allocations of food for human and animal consumption to Government agencies and for private account, and to purchase and procure food for such Government agencies (R. 5).

On February 2, 1943, the Food Distribution Administration, an agency of the Department of Agriculture, in charge of procuring meat for Government agencies, sent respondent a priority order requesting it to deliver 225,000 pounds of lard and pork products, which are hereinafter described, to the Federal Surplus Commodities Corporation, an agency of the United States Gov-

ernment, for delivery under the Lend-Lease program. The order stated that respondent would be paid the ceiling prices applicable under provisions of the Office of Price Administration regulations, and that respondent was required to fill the order in preference to any other contract or purchase order of lower or no priority rating. Prior to the receipt of this order, respondent had supplied pork products to several Government agencies. By February 2, 1943, respondent had decided it could no longer afford to sell to the Government at the prices offered by Government agencies and refused to make delivery. On March 1, 1943, the Director of the Food Distribution Administration, acting under the authority of Executive Order No. 9280 and the specific authorization of the Secretary of Agriculture, made a determination pursuant to the Act of October 16, 1941 (55 Stat. 742), that it was necessary to requisition the property from respondent. The requisition was issued on March 1, 1943, and on March 3, 1943, the United States took title and possession of the following described property which was owned by respondent and was then located at its packing house in Philadelphia, Pennsylvania:

40,000 pounds Cured Regular Hams, 14 to 18 lb. range.

40,000 pounds Cured Clear Bellies, 10 to 14 lb. range.

15,000 pounds Cured Picnics, 6 to 10 lb. range.

30,000 pounds Salted Fatbacks, 8 to 12 lb. range.

100,000 pounds Refined Pure Lard, 1 lb. prints (30 lbs. to carton) (R. 5–6).

Pursuant to instructions, on March 24, 1943, respondent prepared and filed its claim, stating that fair and just compensation for the property requisitioned was the sum of $55,525.00, which included $16,250 for the lard and $39,275 for the pork cuts. Respondent claimed that $39,275 was the cost of replacing the pork cuts and that the figure was arrived at on the basis of a live hog cost of $15.90 per cwt., at Chicago, Illinois, on the date of the requisition. Respondent also claimed that the ceiling prices provided for in applicable regulations of the Office of Price Administration (the prices offered by the United States) were less than fair and just compensation for the property because such ceiling prices were based upon a live hog cost at Chicago at $13.15 per cwt. (R. 6–7).

On May 7, 1943, the Director of the Food Distribution Administration made a preliminary determination that fair and just compensation for the property requisitioned from respondent was the sum of $40,656.28, including $15,543.78 for the lard and $25,112.50 for the pork cuts. The amount determined was computed at the ceiling prices authorized by Revised Maximum Price Regulation No. 148 of the Office of Price Admin-

istration for sale at wholesale of such products in carlond quantities at Philadelphia, Pennsylvania. On May 8, 1943, respondent received notice of the preliminary determination and, on May 15, 1943, wrote the Office of Food Distribution accepting the award for the lard, but objecting to the value determined for the pork cuts on the ground that it was less than the cost of producing or replacing the property (R. 6–7).

On May 22, 1943, the Director of the Food Distribution Administration made a final award for the pork cuts, in the sum of $25,112.50. Respondent was advised that the preliminary award could not be increased because the Government could not pay more than the ceiling prices fixed by the Office of Price Administration. Respondent refused to accept the amount awarded as the value of the pork cuts and was paid 50 percent thereof or $12,556.25.[1] (R. 7).

Price ceilings on the sale of dressed hogs and wholesale pork cuts were first established by the Office of Price Administration on March 9, 1942.[2] On March 3, 1943, the date respondent's property

[1] Respondent accepted and was paid the full amount awarded as compensation for the lard.

[2] There were no price regulations governing the sale of live hogs until September 11, 1943, when Maximum Price Regulation No. 469, establishing ceiling prices for live hogs, effective October 4, 1943, was issued. The principal item in the cost of producing products sold by respondent was the amount it had to pay from time to time for live hogs (R. 7).

was requisitioned, all sales of pork cuts and pork products at wholesale were governed by the provisions of Revised Maximum Price Regulation No. 148 (effective November 2, 1942) and Amendment No. 1 thereto (effective January 19, 1943). Each of these regulations established as the maximum prices for dressed hogs and wholesale pork cuts, the prices prevailing during the period March 3, 1942 to March 7, 1942, inclusive (R. 7–8).

Rising prices caused some packers to sell at a loss under their wholesale pork ceilings. In late December 1942, hog prices again began to rise, reaching an average of $15.59 per cwt. for the month of March 1943. For the week ending March 6, 1943, the Chicago average live hog price was $15.60 per cwt., the highest price attained since October 1920. During the months of February and March 1943, the current prices for livestock were above the levels reflecting a proper relationship to the existing wholesale meat ceilings (R. 8). During the months of May, June, and July 1943, the hog price was low enough to permit slaughterers to make a profit, but in early August another price rise threatened to efface slaughterers' margins. Although the seasonal nature of livestock marketing made periods of loss a commonplace in the packing industry, slaughterers were generally able to balance seasonal losses with profits at other times (R. 9–10).

On July 17, 1942 and March 18, 1943, respondent filed written protests to Maximum Price Regu-

lation No. 148 and Revised Maximum Price Regulation No. 148, respectively, with the Price Administrator. Orders and accompanying opinions denying respondent's protests were entered by the Price Administrator on April 23, 1943 and July 5, 1943. Respondent made no attempt to have these decisions reviewed by the Emergency Court of Appeals as authorized by the Emergency Price Control Act of 1942, nor did it file any complaint in that court after the orders denying respondent's protests were entered (R. 10).

When respondent's property was requisitioned, there was an acute shortage of pork products. As a result, offerings on the market of pork products, particularly of the better cuts of pork, were considerably below normal, and supplies available for the general trade were far short of the demand. On March 13, 1943, the Director of the Food Distribution Administration issued an order requiring each slaughterer operating under Federal inspection to set aside for war uses 45% of all pork and designated percentages of other meat derived from the slaughter of hogs and other livestock (R. 10–11).

Respondent unsuccessfully attempted to replace the property taken by defendant by purchasing pork cuts in the market. Accordingly, in conformity with its usual practice, it purchased and slaughtered live hogs to replace the property requisitioned at a cost of $30,293 (R. 11). The ceiling price of the requisitioned property when

sold at wholesale and in carload quantities at Philadelphia, Pennsylvania, on March 3, 1943, was $25,112.50 (R. 11).[1]

At the time respondent's products were requisitioned, there was a ready market for such products in Philadelphia under prevailing OPA ceiling prices. Prior to and after the date of requisitioning, respondent regularly sold pork cuts and other pork products at these prices. Throughout this period, respondent continued to buy live hogs at prevailing prices and to sell pork products derived from them at the authorized ceiling prices even when the cost thereof was greater then the wholesale prices obtained from them. Respondent chose to do this in order to protect its good will and the investment in its business, to supply customers who were dependent

[1] The purchase order and requisition issued by petitioner called for the delivery of respondent's pork cuts in carload quantities, whereas respondent customarily sold such products in lots of less than 500 pounds each. Respondent's customers, approximately 5,000 in number, are retail meat dealers located in the Philadelphia area whom respondent served by means of 57 route trucks. The ceiling price of the requisitioned property when sold at wholesale in lots of 500 pounds or less in Philadelphia at the time of the taking was $26,362.50. The excess of this figure over the ceiling price of respondent's property when sold at wholesale results from the fact that provisions of Office of Price Administration Maximum Price Regulations which established the market prices authorized the reduction of $1.00 per cwt. for sales at wholesale in carload quantities. The $1.00 differential was intended to partly defray the expense in delivery wholesale in less than carload quantities (R. 11-12).

on it, and to retain its organization of plant and company employees (R. 11).

The court below rejected, as the test of just compensation for respondent's requisitioned meat, the current market price which was the OPA ceiling price and held that since respondent had to replace the articles taken and was unable to do so at the price paid it by the Government, respondent was entitled to the replacement cost of its property. The court concluded that the Government's obligation was to put respondent in as good a position pecuniarily as it was before the property was taken and that payment of the OPA ceiling price would not accomplish this, since the OPA ceiling price was less than the price respondent had paid to acquire the meat and the replacement cost was greater than the OPA ceiling price at which respondent had to sell its products. It accordingly awarded judgment for the respondent in the amount of $17,736.75, the difference between the 50 per centum which the Government had paid the respondent and the replacement cost of the requisitioned property (R. 12–14).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the market value at the time of the requisition constituted the measure of just compensation in the circumstances of the case.

2. In applying as the test of just compensation for the respondent's requisitioned meat the replacement cost thereof.

3. In fixing as just compensation for the meat products requisitioned an amount in excess of the respective maximum market prices thereof as fixed by regulations of the Office of Price Administration at the time of its requisition.

4. In entering judgment for the respondent.

REASONS FOR GRANTING THE WRIT

1. This case presents one aspect of the important question of the effect of the Office of Price Administration's maximum prices fixed by the Price Administrator on the just compensation to be awarded where the United States, in the exercise of its powers under the Act of October 16, 1941, requisitions private property for wartime needs. There are now pending against the United States a large number of actions, involving considerable amounts of money, for awards for property taken under the national defense and wartime requisitioning program. In many of these cases issues similar to that presented here will have to be resolved.*

In addition, the United States Circuit Court of Appeals for the Seventh Circuit, on June 4, 1946,

* The Government's petition for a writ of certiorari in the companion case of *United States of America* v. *The Illinois Pure Aluminum Company*, No. 860, this Term (67 F. Supp. 955 (Ct. Cls.)), refers more fully to the pending litigation turning on decision of the questions presented in these cases.

reached a conclusion opposite to that of the Court of Claims in the case at bar. *Gudsky Bros. Co.* v. *United States*, 155 F. 2d 905. On almost identical facts, the Circuit Court of Appeals held that the Office of Price Administration's ceiling price for beef carcasses established the highest market price and represented the maximum limit of just compensation for the property requisitioned. Thus, there exists between the Circuit Court of Appeals and the Court of Claims a direct conflict on an important question of law which requires settlement by this Court.[1]

2. The decision of the court below is clearly wrong. It is well established that the criterion for determining just compensation is the market value of the requisitioned property at the time of the taking. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *L. Vogelstein & Co.* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246. "The worth of a

[1] In *United States* v. *Delano Park Homes*, 146 F. 2d 473, the Circuit Court of Appeals for the Second Circuit stated by way of dictum: "* * * when competent authority has fixed prices at a maximum, or has denied owners some specific use of their property, it is patently a disregard of its authority, either indirectly to allow a higher price on condemnation, or to allow the price to be figured in disregard of the limitation imposed" (p. 474). To the same effect are *Groves* v. *United States*, 62 F. Supp. 231 (W. D. N. Y.); *Leconer Plumbing and Heating Co.* v. *United States*, 64 F. Supp. 931 (S. D. N. Y.); *Louisville Flying Service, Inc.* v. *United States*, 64 F. Supp. 938 (W. D. Ky.).

thing is the price it will bring." *Standard Oil Co. v. Southern Pac. Co.*, 268 U. S. 146, 158. Where a ready market exists resort cannot be had to other data to ascertain value. *United States v. New River Collieries Co.*, *supra*. See also *United States v. Miller*, 317 U. S. 369, 374, and *Olson v. United States*, *supra*, at page 255. Since, as the court below expressly found (R. 11), there prevailed a ready market at the maximum prices established by Revised Maximum Price Regulation No. 148 for the respondent's products, at the time and place of the taking, those prices constituted just compensation. The fact that those prevailing market prices were limited by valid maximum price regulations did not impair the existence of an actual market or its effectiveness as a measure of just compensation. The maximum prices fixed by the Price Administrator, which had not been attacked by the respondent in the Emergency Court of Appeals, were valid, and the respondent's products could not be legally sold for more than those prices. Consequently, there could be no market price in excess of those fixed by the Price Administrator. Thus, the erroneous use by the court below of the higher replacement cost as a measure of just compensation resulted in giving the respondent a greater return for its property than it could have lawfully obtained had it sold the products in the normal course of its business at not more than the legal maximum prices as it intended to do, and as it actually did

with the replacements. The use of the replacement cost as a basis for just compensation also gave the respondent a preferred status over other meat wholesalers whose property was not taken by the Government. Cf. *United States* v. *Delaware Park Homes, Inc.*, 146 F. 2d 473, 474 (C. C. A. 2).

The error of the court below in its use of the higher replacement cost of the requisitioned property as a measure of just compensation becomes plain when the underlying facts are viewed in the light of this Court's pronouncement in the case of *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–378, that:

> * * * just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings.

The respondent's purposes in obtaining the replacements, were, as found by the court below, to protect its good will and retain its organiza-

tion of plant and employees (R. 11). Hence, the replacement cost used by the court below to ascertain just compensation, was a value particular to the respondent, since the loss sustained in obtaining the replacements stemmed not from the requisition but from the irrelevant fact that the respondent desired to maintain the good will of its customers and to hold its organization intact. Consequently, the court below erroneously measured the just compensation to be paid for the requisitioned property by a special value which the owner, for its own particular purposes, placed upon it, and not upon the general value which prevailed in the ready market. Thus, the court below failed to recognize that "the sovereign must pay only for what it takes, not for opportunities which the owner may lose" by frustration of future business dealings, or through consequential injury to his business as a going concern. See *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U. S. 266, 281–282.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JANUARY 1947

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 862

THE UNITED STATES, PETITIONER

v.

JOHN J. FELIN & CO., INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 12–14) is reported at 67 F. Supp. 1017.

JURISDICTION

The judgment of the Court of Claims was entered on October 7, 1946 (R. 15). The petition for a writ of certiorari was filed on January 7, 1947, and was granted on March 3, 1947 (R. 16). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether in a suit for just compensation by the owner of meat and meat products requisi-

tioned by the United States in the exercise of its wartime powers, the actual market price or the replacement cost was the proper measure of just compensation where the market price, which was the maximum applicable price as fixed by the Office of Price Administration, was less than the owner's cost of replacement.

STATUTE INVOLVED

The pertinent portion of the statute here involved as it read at the time of the requisition in question (the Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181),[1] provided as follows:

> Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of

[1] The statute has since been amended, in respects of no significance to this case, by the Act of June 30, 1943, c. 181, 57 Stat. 271, the Act of June 28, 1944, c. 307, 58 Stat. 624, and the Act of June 30, 1945, c. 208, 59 Stat. 271. See 50 U. S. C. App. (Supp. V) 721.

such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

STATEMENT

Respondent is, and for many years has been, engaged at Philadelphia, Pennsylvania, in the business of packing pork products. It buys hogs in the Chicago, St. Louis, and Indianapolis markets, transports them to Philadelphia for slaughter and conversion there into various pork cuts and products, and sells its products at wholesale, distributing them by trucks to retail dealers in the metropolitan area of Philadelphia. (R. 5.)

During the early months of 1943, in addition to a greatly increased civilian demand, large quantities of pork products were being purchased by Government agencies for war uses. There was consequently an acute shortage of pork for the civilian population; offerings on the market were considerably below normal; supplies available for the general trade were far short of the demand; and the Food Distribution Administration, which was in charge of procuring meat for Government agencies for shipment under the Lend-Lease program, was having difficulty in obtaining its requirements. (R. 5, 10–11.)[2]

[2] The Food Distribution Administration was an agency within the Department of Agriculture created by Executive Order No. 9280 (7 F. R. 10179, 50 U. S. C. App. (Supp. V) 601 note). This order authorized and directed the Secretary of Agriculture to assume full responsibility for, and control over, the Nation's food program, in order to assure an adequate supply and efficient distribution of food to meet war and essential civilian needs. Delegated to him were the powers, among others, to assign food pri-

It was at this time, on February 2, 1943, that the Food Distribution Administration sent respondent a so-called priority order. This was a purchase order requesting respondent to deliver 225,000 pounds of lard and pork products to the Federal Surplus Commodities Corporation, an agency of the United States, for delivery under the Lend-Lease program. The order stated that respondent would be paid the applicable O. P. A. ceiling prices and advised respondent that it was required to fill the order in preference to other contracts or purchase orders. (R. 5–6.)[4]

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orities and allocate food to governmental agencies and for private account, and to purchase and procure food for the Federal agencies (R. 5).

[4] The priority order addressed to respondent made specific reference to Priority Regulation No. 1, as amended, of the War Production Board (6 F. R. 6680; 7 F. R. 3311, 4832, 6256, 11060). Under that regulation, as it then read, "Any contract or purchase order placed by any agency of the United States Government for material or equipment to be delivered * * * pursuant to the Act of March 11, 1941" (the Lend-Lease Act), was designated a "Defense Order" (§ 944.1 (b); 6 F. R. 6680; 7 F. R. 3311, 4832; CCH, War Law Service, Priorities, Par. 30,901.102); was assigned, at the least, the high preference rating of A–10 (§ 944.1 (a); 6 F. R. 6680; CCH, *op. cit.*, Par. 30,901.106); and was required to be accepted and filled in preference to other contracts and purchase orders bearing lower or no preference ratings (§§ 944.2, 944.7; 6 F. R. 6680; 7 F. R. 4832, 6256; CCH, *op. cit.*, Pars. 30,901.118, 30,901.165). "Material" was defined to mean "any commodity, equipment, accessory, part, assembly or product of any kind" (§ 944.1 (c); 6 F. R. 6680; CCH, *op. cit.*, Par. 30,901.102). Wilful failure to comply with Priority Regulation No. 1 was subject to criminal prosecution under Title III of the

Although respondent had theretofore supplied pork products to several Government agencies, it had, by February 2, 1943, decided that it could no longer afford to sell at the prices offered by them. Accordingly, it refused to make delivery in accordance with the priority order, and the Director of the Food Distribution Administration, acting under the authority of Executive Order 9280 and by specific authorization of the Secretary of Agriculture, issued, on March 1, 1943, the requisition involved here. Title and possession of the property requisitioned was taken by the United States on March 3, 1943. The property consisted of the following products located at respondent's packing house in Philadelphia, Pennsylvania:

40,000 lbs. Cured Regular Hams, 14 to 18 lb. range
40,000 lbs. Cured Clear Bellies, 10 to 14 lb. range
15,000 lbs. Cured Picnics, 6 to 10 lb. range
30,000 lbs. Salted Fatbacks, 8 to 12 lb. range
100,000 lbs. Refined Pure Lard, 1 lb. prints (30 lbs. to carton).

(R. 6).

Second War Powers Act (Act of March 27, 1942, c. 199, Tit. III, § 301, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633).

On March 13, 1943, the Director of the Food Distribution Administration issued an order which required each slaughterer operating under Federal inspection to set aside for war uses 45 percent of all pork and designated percentages of other meat derived from the slaughter of hogs and other livestock (R. 11).

On March 24, 1943, respondent prepared, and promptly thereafter filed, its claim with the Food Distribution Administration, stating that fair and just compensation for the property requisitioned was the sum of $55,525—$16,250 for the lard and $39,275 for the pork cuts. Respondent claimed that $39,275 was the cost of replacing the pork cuts on the basis of a live hog cost of $15.90 per cwt. at Chicago, Illinois, on the date of the requisition, contending that the applicable O. P. A. ceiling prices afforded less than fair and just compensation because they were based on a live hog cost at Chicago of only $13.15 per cwt. On May 7, 1943, the Director of the Food Distribution Administration made a preliminary determination that fair and just compensation for the property requisitioned was the sum of $40,656.28—$15,543.78 for the lard and $25,112.50 for the pork cuts. These amounts were computed by reference to the O. P. A. ceiling prices applicable for sale of the requisitioned products at wholesale in carload quantities at Philadelphia, Pennsylvania. Respondent received notice of the preliminary determination on May 8, and, on May 15, 1943, wrote the Office of Food Distribution accepting the award for the lard, but objecting to the award for the pork cuts on the ground that it was less than the cost of producing or replacing that property. On May 22, 1943, the Director of the Food Distribution Administration made a final award for the

pork cuts in the sum of $25,112.50. Respondent refused to accept that amount and, in accordance with the Act of October 16, 1941, as amended, *supra*, pp. 2–3, was paid 50 per cent thereof, that is, $12,556.25. (R. 6–7.)[4]

On March 3, 1943, when respondent's pork cuts were requisitioned, there was a ready market for such products at Philadelphia, and the prevailing market prices were the maximum prices established by Revised Maximum Price Regulation No. 148 of the Office of Price Administration[5] and Amendment No. 1 thereto.[6] Both prior to and after the date of requisition, respondent regularly sold pork cuts and other pork products in that market at those prevailing established ceiling prices. They were the maximum prices at which respondent could legally dispose of its products, and respondent continued to buy live hogs at unrestricted prevailing prices[7] and to sell pork products derived from them at the ceiling prices, even when the cost of live hogs was greater than the wholesale prices of the products obtained from them. (R. 11.) Respondent chose to do this in

[4] Respondent has accepted and been paid the full amount awarded as compensation for the lard (R. 7).

[5] Issued October 22, 1942; 7 F. R. 8609, 8948, 9005.

[6] Issued January 13, 1943; 8 F. R. 544.

[7] There were no price regulations governing the sale of live hogs until September 11, 1943, when Maximum Price Regulation No. 469 (8 F. R. 12562) was issued, establishing ceiling prices of live hogs effective on October 4, 1943 (R. 9).

order to protect its good will and the investment in its business, in order to supply customers who were dependent on it, and in order to retain its organization of plant and company employees at a time when the labor situation in Philadelphia was very tense (R. 11).

Price ceilings on the sale of wholesale pork cuts had first been established by the Office of Price Administration on March 9, 1942, at those prices which had prevailed for such products during the period from March 3, 1942 to March 7, 1942, inclusive. Those prices reflected a then Chicago average live hog price of $13.15 per cwt.* The maximum prices established by Revised Maximum Price Regulation No. 148 and Amendment No. 1 thereto (which were in effect when respondent's property was requisitioned) likewise were based on the March 3–March 7, 1942 price levels (R. 7–8). Live hog prices, unrestricted by maximum price regulation, began to rise, however, soon after the institution of controls on the prices for pork products, and although there was a price decline in November and December, 1942, hog prices began to rise again in late December 1942, reaching an average of $15.59 per cwt. for the month of March 1943 and of $15.60 per cwt. for

* Chicago market quotations are the basic quotations in the packing industry and are generally used for arriving at prices on hogs and pork products in other market centers (R. 8).

the week ending March 6, 1943. During the months of February and March 1943, the current prices for livestock were above the levels reflecting a proper relationship to the existing wholesale meat ceilings. (R. 8.)*

On July 17, 1942, and March 18, 1943, respondent filed with the Price Administrator written protests to Maximum Price Regulation No. 148, and Revised Maximum Price Regulation No. 148, respectively. Orders and accompanying opinions denying respondent's protests were entered by the Price Administrator on April 23, 1943, and July 5, 1943. Respondent made no attempt to have these decisions reviewed by the Emergency Court

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*In the Statement of Considerations accompanying Maximum Price Regulation No. 469, referred to in the special findings of the court below (R. 9–10), the Price Administrator noted that the seasonal nature of livestock marketing had made periods of loss a commonplace in the packing industry and that slaughterers generally had been able to balance seasonal losses with profits at other times; thus, the hog prices during the months of May, June, and July, 1943, had been low enough to permit slaughterers to make a profit, and many slaughterers who had suffered losses during the first three months of 1943 had "undoubtedly" recouped those losses during May, June, and July. He was of the opinion, nevertheless, that the sharp fluctuation in live hog prices demonstrated that the indirect controls previously imposed—wholesale and retail price ceilings, rationing, and slaughter restrictions—were not fully effective and that the establishment of ceiling prices for live hogs had become necessary in order to remove the threat of repeated crises, to permit necessary stability in the operations of the industry, and to assure the continuance of hog prices properly related to wholesale pork ceilings.

of Appeals, as authorized by the Emergency Price Control Act of 1942. (R. 10.)

Respondent attempted to replace the property requisitioned by purchasing pork cuts in the market. This proved unsuccessful, and respondent, in accordance with its usual practice, purchased and slaughtered live hogs to replace the cuts requisitioned. The replacement cost was $30,293. The ceiling price of the requisitioned property when sold at wholesale and in carload quantities at Philadelphia, Pennsylvania, on March 3, 1943, was $25,112.50. (R. 11.)[10]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the market value at the time of the requisition constituted the measur

[10] The purchase order and requisition issued by petitioner called for the delivery of respondent's pork cuts in carload quantities, whereas respondent customarily sold such products in lots of less than 500 pounds each. Respondent's customers, approximately 5,000 in number, are retail meat dealers located in the Philadelphia area, whom respondent served by means of 57 route trucks. The ceiling price of the requisitioned property when sold at wholesale in lots of 500 pounds or less in Philadelphia at the time of the taking was $26,362.50. The excess of this figure over the ceiling price of respondent's property when sold at wholesale results from the fact that provisions of the Maximum Price Regulation which established the market prices authorized a reduction of $1.00 per cwt. for sales at wholesale in carload quantities. The $1.00 differential was intended partly to defray the expense in delivery wholesale in less than carload quantities (R. 11–12).

of just compensation in the circumstances of the case.

2. In applying as the test of just compensation for the respondent's requisitioned meat the replacement cost thereof.

3. In fixing as just compensation for the meat products requisitioned an amount in excess of the respective maximum market prices thereof as fixed by regulations of the Office of Price Administration at the time of its requisition.

4. In entering judgment for the respondent.

SUMMARY OF ARGUMENT

I

The Court of Claims erred in awarding respondent a judgment for the cost of replacing the requisitioned pork products. Its decision rests solely on the peculiar value which the property taken had to respondent personally and thus ignores the settled principles that just compensation in eminent domain cases is "for the property, and not to the owner" and that such special value as the property may have to its owner is of no significance in determining just compensation.

The most reasonable and satisfactory criterion for determining just compensation is the market value of the property at the time of taking, expressed in terms of dollars and cents; and where an actual market exists in which the property in question is being actively traded, the prevailing

market prices are the determinant. In this case where, as the court below found, there was a "ready market" for the requisitioned products at the time and place of requisition and the prevailing market prices were the applicable maximum prices established by the Office of Price Administration, those prices govern. This is particularly true here, where respondent was active in regularly selling such products in the existing market at the prevailing O. P. A. prices.

There are no valid reasons for rejecting the market price standard. That the market prices were less than the cost of replacing the property seized is of no significance. Cost is never the criterion for determining the fair compensation for commodities taken by the Government.

Nor does the fact that the market prices were limited by, and in fact the equivalent of, the O. P. A. ceiling prices impair their effectiveness as the measure of just compensation. Applicable governmental maximum price regulations have no less significance in their impact on the market value of the commodities to which they apply than do the facts that a war exists and that market conditions have thereby been rendered abnormal. And such circumstances, as this Court has recognized, are as material as other factors in the market in ascertaining what is just compensation.

The judgment below would, in effect, indemnify respondent not only for the loss of the pork cuts

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taken by the Government but also for the loss of the opportunity to sell such products to its regular customers and thus to retain those customers and their good will. Even if such an opportunity were available to respondent, which is by no means certain, its loss was only incidental to the taking of the pork products and, in accordance with established principles, not compensable.

II

The rule of the decision below, if approved, would render impossible the maintenance of any effective price control system to counteract inflation in a wartime economy. If sellers, like respondent here, had been permitted to avoid the effect of maximum price regulations issued under the Emergency Price Control Act of 1942 simply by withholding their products from purchaser Federal, State, and local governments, the Congressional purpose expressed in the Act, to protect these governments from excessive price rises, would have been defeated. But, more significant, the United States cannot hope effectively to stem the tide of inflation during wartime if its own procurement program must remain free from control. For, during a war period, Government buying dominates the markets. There is consequently little promise of generally restricting prices to reasonable levels during time of war unless prices on sales to the Government are effectively controlled.

Moreover, the judgment below, in effect, would compensate respondent for the impairment of the value of its pork products occasioned by the Government's maximum price regulations, for which loss compensation is traditionally not recoverable. It is a palpable injustice to award respondent such compensation while denying it to the much larger class of packers who have voluntarily supplied the Government and thereby, and in sales for private account, have suffered the very same losses as has respondent here.

ARGUMENT

The requisition of respondent's property was made under the Act of October 16, 1941, as amended, *supra*, pp. 2–3. That statute authorizes requisitions of such property "upon the payment of fair and just compensation * * * to be determined * * * as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States." Accordingly, the principles enunciated by this Court and applied for ascertaining just compensation in eminent domain cases are applicable. We submit that the decision below violates those principles. We urge further that the decision cannot be reconciled with an effective system of maximum price regulation during a war period, when the Government is a dominant buyer in the nation's markets.

I

THE TRUE MEASURE OF JUST COMPENSATION TO WHICH RESPONDENT WAS ENTITLED FOR THE TAKING OF ITS PRODUCTS WAS THE ACTUAL MARKET PRICES OF SUCH PRODUCTS PREVAILING IN THE MARKET WHICH EXISTED AT THE TIME OF THE TAKING AND IN WHICH RESPONDENT ACTIVELY PARTICIPATED, NOTWITHSTANDING THE FACT THAT THE MARKET PRICES WERE THE EQUIVALENT OF THE O. P. A. CEILING PRICES

The Court of Claims found that at the time respondent's pork products were requisitioned, a ready market for such products existed at Philadelphia, that the prevailing market prices for such products in Philadelphia were the established O. P. A. ceiling prices, and that respondent regularly sold such products, both prior and subsequent to the taking, at those prevailing ceiling prices (R. 11). Nevertheless, the court expressly rejected the market prices as the measure of just compensation (R. 12) and awarded respondent the replacement cost of the commodities taken (R. 13–14). This was accepted as the proper measure of compensation apparently because respondent "felt obliged to furnish its customers a certain amount of products, although at a loss, in order to retain their good will and to provide employment for its employees, and thus hold its organization together;" because in order so to supply its customers, it had to replace the products taken; and because the market prices then

prevailing were less than the cost of replacing those products (R. 13). An award of compensation computed on the market price basis would not, said the court, put respondent in as good a position pecuniarily as it was in before its property was taken, and would thus fall short of just compensation (*Ibid.*).

The error in the rationale of the Court of Claims is plain. This Court has indeed broadly stated that just compensation "means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken * * *." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304. But it has cautioned that that is true only in the sense that he is to receive the value of the property taken. *United States* v. *General Motors Corp.*, 323 U. S. 373, 379. Requisition proceedings are essentially proceedings *in rem* (Cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 376), and the just compensation, required in such proceedings, is "for the property, and not to the owner." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326. Any particular use to which the owner may have been devoting or intending to devote his property and such special value as it may have had to him are, therefore, of no significance in ascertaining the extent of the compensation to which he is entitled. *United States* v. *Petty Motor Co., supra*, at 377.

The court below ignored these settled principles, and rested its judgment solely upon the peculiar value which the property taken had to respondent personally. There is no question that if sold in the market actually existing for such commodities in Philadelphia on March 3, 1943, when the requisition occurred, the pork cuts would have brought only the O. P. A. ceiling prices. Those were not only the legal maxima; they were the prices which then prevailed (R. 11). Respondent had sold just such pork products at those very prices, before March 3, 1943, and it continued to do so after the requisition; indeed, the very pork cuts which respondent produced to replace those taken by the Government must have been sold at those prices, and if the Government had not requisitioned these products they would undoubtedly have been sold by the respondent in the course of trade at the same prices. Nevertheless, the Court of Claims awards respondent not the amount which it could have procured in the market, but a sum considerably greater. It thus compensates respondent not for the products actually taken by the Government but for the special value which those products may have had to respondent as items usable by it to retain the good will of its regular customers.

1. The decision below, if allowed to stand, will tend to foster an inequality and confusion which is foreign to the concept of fair and just compensation. Cf. *C. G. Blake Co.* v. *United States*, 275

Fed. 861 (S. D. Ohio), affirmed, 279 Fed. 71 (C. C. A. 6). The Court of Claims applied the standard of replacement cost apparently because it found that respondent "felt obliged" to replace the property taken. Under this rationalization, had the pork cuts needed by the Government been requisitioned not from respondent but from its customers, or from other packers who had no need to replace such products in order to maintain good will, the measure of compensation would apparently not have been the replacement cost. Similarly, had only a small quantity been requisitioned from respondent, insignificant so far as its effect on respondent's supposed obligations to its regular customers was concerned, that measure could not, even under the lower court's reasoning, be said to be replacement cost. Thus, it would seem that the Court of Claims has determined just compensation not by considering the worth of the property taken, but rather by considering the peculiar status of the person whose property has been taken.

The nub of the matter is that, at least in the ordinary case, the most reasonable and satisfactory criterion which the courts have devised for determining just compensation (although perhaps not the perfect one, *United States* v. *Miller*, 317 U. S. 369, 374) is the market value of the property at the time of taking, expressed in terms of dollars and cents. *Albrecht* v. *United States*, No.

148, this Term, decided February 3, 1947; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377; *United States* v. *General Motors Corp.*, 323 U. S. 373, 379; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 275; *Olson* v. *United States*, 292 U. S. 246, 255; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 124; *L. Vogelstein & Co., Inc.* v. *United States*, 262 U. S. 337, 340; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 80.

Where there is in fact no market in which the property in question is being actively bought and sold, market value is determined by judicial postulation of such a market and ascertainment of "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy * * *." *Olson* v. *United States, supra*, at 257; *Brooks-Scanlon Corp.* v. *United States, supra*, at 124. But where an actual market does exist, and there is trading in the commodities requisitioned, there is no need to resort to judicial hypothesis, and the prevailing market prices become the determinant of market value and of just compensation. *L. Vogelstein & Co., Inc.* v. *United States, supra; United States* v. *New River Collieries Co.*, 262 U. S. 341; *C. G. Blake Co.* v. *United States*, 275 Fed. 861 (S. D. Ohio), affirmed, 279 Fed. 71 (C. C. A. 6). In such circumstances, as the adage has it, "The worth of a thing is the

price it will bring." *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 158.[11]

These latter are the very circumstances in the instant suit. Here, as the court below found, there was "a ready market" for such pork products as were requisitioned from respondent at the time and at the place of requisition (R. 11). The prevailing market prices were easily ascertainable; they were the maximum prices established by the Office of Price Administration (*Ibid.*). At such prices, the property requisitioned from respondent had a market value of $25,112.50 (*Ibid.*). On these facts alone, respondent was entitled, as just compensation, to payment of only $25,112.50, with interest from the date of taking to the date payment was made or offered to respondent.

In addition, here, respondent was active in regularly selling its pork products in the existing market at the prevailing O. P. A. prices (R. 11). This it continued to do notwithstanding the fact that at times it was incurring a loss. Clearly, respondent is justly compensated for the requisitioned pork to the full extent intended by the Fifth Amendment when it is paid the very prices

[11] "Where there have been recent actual sales of substantially similar property, market value can be ascertained from an observation of those sales. It is unnecessary to go behind the scenes and inquire what influenced the buyers in paying the prices that they did." Hale, *Valuation in Condemnation Cases* (1931), 31 Col. L. Rev. 1, 2; Marcus, *The Taking and Destruction of Property under a Defense and War Program* (1942), 27 Cornell L. Q. 476, 529.

it was regularly receiving in the market for the pork taken.

2. The two primary reasons advanced by respondent in the court below, for rejecting the normal standard of market price in this case are invalid. It complained, first that the market prices were less than the cost of replacing the property seized [12] and, second, that those prices were limited by regulations of the Office of Price Administration.

a. As to the first, it seems sufficient to note that the divergence of market price from cost of producing or replacing property taken has never been held an appropriate reason for rejecting market price as the standard in determining just compensation. Cost is never the criterion for determining market value of a commodity and fair compensation for its taking. "It is the property and not the cost of it that is protected by the Fifth Amendment." *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123. "* * * the Fifth Amendment allows the owner only the fair

[12] The opinion of the court below speaks in terms of the original cost of acquiring the pork cuts requisitioned (R. 13). There is, however, no finding as to that cost; nor is there any telling just when the products taken were produced or acquired. The only relevant finding is with respect to the cost of replacing, that is reproducing, such products in March, 1943 (R. 11). Whatever the cost of production or reproduction, however, the reliability of market price as the measure of just compensation is, as we shall show, unimpaired.

market value of his property; it does not guarantee him a return of his investment * * *." *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 285. See, also, *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328.

b. Nor does the fact that the market prices were limited by and, in fact, the equivalent of the O. P. A. ceiling prices impair their effectiveness as the measure of fair compensation. With a ready market, market prices remain the best measure of market value. There is no logic in disregarding market prices because they may reflect conditions in the market which are imposed or spring from governmental intervention. As the district court said in *C. G. Blake Co.* v. *United States*, 275 Fed. 861 (S. D. Ohio), affirmed, 279 Fed. 71 (C. C. A. 6), when it rejected contentions advanced by the Government which are strikingly similar to those here urged by respondent (275 Fed., at 864):

> The fact that laws and governmental regulations affect the sale of commodities does not abrogate the settled rule that market value is just compensation. All transactions in the commercial world are more or less affected by such conditions. Tariffs, transportation regulations, and various legal restraints and restrictions are

> in constant operation. Neither does the fact that unusual conditions affect the market mean that there is no market or market price. Drouths, floods, commercial panics, crop failures, labor difficulties, and other causes frequently affect markets seriously, but not so as to warrant a court, when assessing compensation consequent upon the exercise of the right of eminent domain, in saying that there is no market. The effects of war may differ in degree, but, so long as a market—that is, a general buying and selling of the commodity—exists, the rule persists. * * *

In *L. Vogelstein & Co., Inc.* v. *United States*, 262 U. S. 337, this Court approved the prevailing market price as a standard of just compensation although that price was fixed with the approval of the President and did not necessarily reflect conditions of supply and demand in a free market unhampered by war conditions.[18] In that case,

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[18] Nor did the Court of Claims feel compelled to reject market price as the criterion of just compensation in that case. 56 C. Cls. 362. Indeed, the instant case seems to mark a departure by the Court of Claims from a contrary rule announced and applied to the pecuniary disadvantage of the Government in numerous of its decisions arising out of requisitions during World War I. See *e. g.*, *Borland, Rec., Hudson Navig. Co.* v. *United States*, 57 C. Cls., 411, 416:

"* * * the contention that there was no market value for ships or for their use at the time this ship was taken is not tenable. The demand for ships was universal; the demand for their use was equally so. It is true that the market was affected by the war; war always affects market conditions, either enhancing prices or lowering them, but the fact that

the United States had requisitioned some 12,500,000 pounds of copper from the Vogelstein company and had paid it 23½ cents per pound. That was the price fixed in an agreement which had been made between the War Industries Board and representatives of the copper producers, and approved by the President. Although it does not appear that the company had been a party to the agreement, it had, through its controlling stockholder, actively cooperated in creating the organizational machinery to carry it into effect. During the period in which the appellant's copper was taken, about 283,000,000 pounds were furnished the United States at the 23½-cent price; the Vogelstein company itself sold some 25,000,000 pounds to the Government at that price; and that price prevailed uniformly in the market. Despite the fact that the average cost of the copper stocks which the company held when the 12,500,000 pounds were taken from it was 26.88 cents per pound, the Court affirmed the award of only 23½ cents, saying (262 U. S. at 340):

> * * * The market price was paid. The market value of the copper taken at the time it was taken measures the owner's

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war has such effects does not affect the principles which must govern the courts in ascertaining values * * *."

See, also, *Atlantic Refining Co.* v. *United States*, 72 C. Cls. 1, certiorari denied, 285 U. S. 542; *Standard Transportation Co.* v. *United States*, 61 C. Cls. 906, certiorari denied, 273 U. S. 732; *Gulf Refining Co.* v. *United States*, 58 C. Cls. 559.

> compensation * * *. The higher prices, if any, paid by appellant for the copper it was compelled to take on long time purchase contracts are not evidence of the value of the copper at the time it was obtained by the United States. The United States is under no obligation to make good the loss. Appellant would be entitled to the gain if it had purchased at less than the market price at the time of taking.

In deciding the *Vogelstein* case, this Court was, of course, sensitive to the company's acquiescence in the market price and to its cooperation in putting and maintaining it in effect. But there is, we submit, no essential difference, for just compensation purposes, between a maximum market price which is maintained by majority agreement among the members of the industry involved and one which is maintained by regulation established by the Government as representative of the public. Moreover, in this case, parallel to the *Vogelstein* case, we find respondent regularly selling its products at the prevailing O. P. A. maximum prices (R. 11), notwithstanding the fact that respondent was apparently no more pleased with those prices than was the Vogelstein company with the price fixed by agreement for its copper.[14]

[14] It is noteworthy that although respondent, together with other packers, filed written protests against the maximum price regulations limiting the prices for its pork products and those protests were rejected by the Price Administra-

It is difficult to understand why applicable governmental maximum price regulations should have any less significance in their impact on the market value of the commodities to which they apply than

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tor, it failed to avail itself of the review open to it in the Emergency Court of Appeals (R. 10). Cf. *Yakus* v. *United States*, 321 U. S. 414, 443–447. Respondent's reason for failing to carry its attack on the price regulations to the Emergency Court of Appeals is not clear from the record, but some hint may be found in the following statement in the Price Administrator's opinion accompanying his order of July 5, 1943, denying respondent's protest and those of the other protestants against Revised Maximum Price Regulation No. 148 (O. P. A. Docket No. 1148–188–P Consolidated):

"The evidence adduced is not sufficient to sustain the Protestants' attack on the general fairness of the regulation based on an alleged "squeeze," caused by increases in the cost of live hogs. Although the objection to the regulation is set forth in general terms as though the condition were one common to the entire industry, no evidence was submitted to support this conclusion. The three Protestants who submitted further evidence did not even thus sustain their claims of individual hardship. One of them showed a net profit of $60,492.44 for the five months period ending March 27, 1942; another a net profit of $6,838.00 for the three months period ending April 1, 1943, and the third failed to submit a profit and loss statement and balance sheet although specifically requested to do so. Only one Protestant submitted profit and loss figures in its original protest. Although its figures indicated a loss for the limited period from February 27 to March 27, 1943, reference to its financial report filed with the Office of Price Administration reveals that its net income after taxes was $25,658.05 for the fiscal year ending October 31, 1942. Only four other Protestants have filed such financial reports. One of these shows profits through the year 1942, and a second also for the first quarter of 1943. For the remaining two Protestants, such reports indicate losses in the year 1942."

do the facts that a war exists and that market conditions have thereby been rendered abnormal.[15] This Court has had occasion to observe, in connection with the exercise of the power of eminent domain during World War I, that just compensation is "the sum which, considering all the circumstances—*uncertainties of the war and the rest*—probably could have been obtained" for a sale of the property in question. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123–124 (Italics supplied). And most of the courts and commentators who have considered related problems arising during this war are of the same view. *United States* v. *Delano Park Homes,* 146 F. 2d 473 (C. C. A. 2) per L. Hand, J.); *Iriarte* v. *United States,* 157 F. 2d 105 (C. C. A. 1); *United*

[15] The aside in *Bowles* v. *Willingham*, 321 U. S. 503, 517 (where the court holds that it is no constitutional objection to the fixing of maximum rents that they are established as fair and equitable on a class, rather than an individual basis) to the effect that such regulations do not present "a situation which involves a 'taking' of property" (and cf. *Yakus* v. *United States*, 321 U. S. 414, 437–438) obviously does not mean that O. P. A. ceiling prices or rentals, or sums less in amount can in no case constitute just compensation for a taking. Where O. P. A. prices become the prevailing prices in the market, *Bowles v. Willingham* can hardly be read to disqualify them as standards for acertaining just compensation in situations involving "taking." It is noteworthy that where the property of a public utility has been condemned, there appears to have been no reluctance, when ascertaining just compensation for the franchise destroyed, to compute earning power by reference to Government-fixed fees. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329.

States v. *Sanitary Dist. of Chicago*, 149 F. 2d 951 (C. C. A. 7), certiorari dismissed *sub nom. Feldman* v. *United States*, 326 U. S. 687; *Cudahy Bros.* v. *United States*, 155 F. 2d 905 (C. C. A. 7); Note, *Legal and Economic Aspects of Wartime Price Control* (1942), 51 Yale L. J. 819, 840, fn. 102; Marcus, *The Taking and Destruction of Property under a Defense and War Program* (1942), 27 Cornell L. Q. 476, 529; Note (1946), 60 Harv. L. Rev. 132.[16]

[16] Accord: *United States* v. *122 Acres of Land*, 52 F. Supp. 650 (E. D. N. Y.); *Lessner Plumbing and Heating Co., Inc.* v. *United States*, 64 F. Supp. 931 (S. D. N. Y.); *Graves* v. *United States*, 62 F. Supp. 231 (W. D. N. Y.); *Louisville Flying Service, Inc.* v. *United States*, 64 F. Supp. 938 (W. D. Ky.). But see: *Walker* v. *United States*, 64 F. Supp. 135 (C. Cls.); *Coombs* v. *United States*, 65 F. Supp. 1014 (C. Cls.); *The Illinois Pure Aluminum Co.* v. *United States*, 67 F. Supp. 955 (C. Cls.), certiorari denied No. 860, this Term, March 10, 1947; *Arkansas Valley Ry. Inc.* v. *United States*, 68 F. Supp. 727 (C. Cls.), certiorari dismissed on motion of petitioner, No. 996, this Term, March 31, 1947; *Kaiser* v. *United States*, 69 F. Supp. 588 (C. Cls.); *Adler Metal Products Corp.* v. *United States*, 69 F. Supp. 591 (C. Cls.). Though we question most of these decisions, we submit that they are all distinguishable from the case in hand. In the *Walker* case, the court found that the market for the commodity there involved, raw silk, "had simply disappeared" prior to the taking (64 F. Supp., at 137); nevertheless the O. P. A. ceiling price, which had but recently been revoked, was held the best measure of just compensation. In *Coombs* and *Arkansas Valley*, the court rejected the O. P. A. ceiling prices for the items taken because it held that it was not the separate items, but the integrated businesses in place which had been requisitioned and that it was compensation

3. What the judgment below would do for respondent is to indemnify it not only for the loss of the pork cuts taken by the Government, but also for the loss of the opportunity to sell such products to its regular customers and thereby to retain those customers and their good will. Even if we assumed that such an opportunity were available to respondent, which is by no means certain,[17] the loss of that opportunity did not entitle

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for the latter and not for the individual items which the Government had to pay. Moreover, it should be noted that when *Arkansas Valley* reached this Court, the railroad for the first time argued the inapplicability of the O. P. A. ceiling prices (Resp. Br. in Opposition to Petit. for Cert., pp. 2–3); and when Government counsel discovered that O. P. A. prices were indeed not applicable, they moved for dismissal of the petition for a writ of certiorari. In *Illinois Pure Aluminum*, *Kaiser*, and *Adler Metal Products* cases, the court was confronted with the requisition of scarce metals processed or semi-processed for use in nonessential and nonpermissible manufacture and rejected Government-fixed prices as the measures of just compensation, in effect, because there was no demonstrated regular market for such items in the condition in which they were requisitioned at the Government prices.

[17] On February 2, 1943, a month before the requisition occurred, respondent received a priority order from the Food Distribution Administration, to which, under applicable War Production Board regulations, respondent was compelled, to the extent it did sell the products later requisitioned, to give preference. See fn. 3, p. 5, *supra*. Failure to comply with this requirement was punishable as a crime under Title III of the Second War Powers Act (Act of March 27, 1942, c. 199, Tit. III, § 301, 56 Stat. 177, 50 U. S. C. App. (Supp. V) 633). In those circumstances, it is

it to any compensation. Such a loss would be only a business loss incidental to the taking of the pork cuts, and for such losses this Court has consistently denied recovery. As recently as the last Term, this Court said: "* * * Since 'market-value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings." *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–378. For "* * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose * * *." *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–282.

In *Bothwell* v. *United States*, 254 U. S. 231, and *Mitchell* v. *United States*, 267 U. S. 341, recovery was denied owners of land taken by the United States for the resulting complete destruction of

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doubtful whether respondent had any opportunity at all to sell the pork cuts to his private customers and whether it could, in any event, recover damages for the loss of such an opportunity occasioned by the taking. Cf. *Nortz* v. *United States*, 294 U. S. 317, and *Perry* v. *United States*, 294 U. S. 331. Such a priority regulation, frustrating respondent's obligations to other customers, does not in itself constitute a taking compensable under the Fifth Amendment. Cf. *Bowles* v. *Willingham*, 321 U. S. 503, 517–519; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188.

the businesses which they had been conducting on that land. In the light of those decisions, it can hardly be suggested that respondent is entitled to be repaid its investment in live hogs expended solely because it "felt obliged" (R. 13) to furnish its regular customers with a continual, though reduced, supply of pork cuts, lest its failure to do so might possibly damage its business. Respondent would not be entitled to be compensated for such damage even had it occurred, let alone for the investment made to assure that no such damage would occur.[18]

[18] It is noteworthy that there is no finding that respondent did in fact suffer any damages to its business as a consequence of the requisition. Although the court found that the principal item in the cost of producing products sold by respondent was the amount it had to pay from time to time for live hogs (R. 7), there is no finding as to respondent's profit-loss experience under the regulated prices for its pork products over any period of sufficient duration to neutralize the seasonal factors. The court below adjudged only that respondent be indemnified for expenditures which it "felt obliged" (R. 13) or "chose" (R. 11) to make "in order to protect its good will and the investment in its business, in order to supply customers who were dependent on it and in order to retain its organization of plant and company employees at a time when the labor situation in Philadelphia was very tense" (*Ibid.*). Therefore, the loss of business was at most speculative and it could have afforded respondent no basis for recovery even if it had been otherwise eligible for compensation. Cf. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 276; *Olson* v. *United States*, 292 U. S. 246, 256–257; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 79–80.

The reliance of the court below on the *General Motors* case, 323 U. S. 373 (R. 12, note 1), is misplaced. That case did not modify the long-established principle that consequential damages are not compensable; to the contrary, it expressly reaffirmed that doctrine. *Id.*, 323 U. S., at 379. The holding of the case is merely this: that where a portion of a leasehold is taken by the United States, the cost of removal from the premises and return thereto when the taking is terminated must be considered—not as independent items of damage, but as conditions to aid in determining the usual, the market price for the interest in the leasehold taken at the time of taking. This present suit involves the complete taking of personalty with no provision for its return; it presents a situation entirely different from *General Motors*. See *United States* v. *Petty Motor Co.*, 327 U. S., at 379–380.

II

THE RULE OF THE DECISION BELOW, IF APPROVED, WOULD RENDER IMPOSSIBLE THE MAINTENANCE OF ANY EFFECTIVE PRICE CONTROL SYSTEM TO COUNTERACT INFLATION IN A WARTIME ECONOMY.

Reversal of the decision below is, then, plainly required by the long-established and traditional reliance of the courts on market value as the determinant of just compensation in eminent domain cases. As we have indicated, there are no reasons for departing from the usual rules in this

case. To the contrary, there are cogent reasons why the rationale of the opinion below should be rejected; to affirm it would be to make it impossible in the future to protect the public interest through the effective prevention of a costly inflation during wartime.

1. The Director of the Food Distribution Administration determined that as compensation for the pork cuts requisitioned from it, respondent was entitled to a sum equivalent to what it could have procured had it sold such products in the Philadelphia market at the applicable O. P. A. ceiling prices (R. 7). These ceiling prices were the prevailing prices at the time of the requisition in a market which then actually existed in Philadelphia for such products (R. 11). Respondent rejected the award proffered it by the Government, contending that it was entitled to an amount equal to the cost of replacing the products which the Government had taken (R. 6–7). The Court of Claims, acquiescing in that view of the case, ordered that respondent recover the replacement cost, a sum some $5,000 more than the amount for which the pork cuts would have sold at the applicable maximum prices. In so doing, the court disregarded maximum price regulations duly promulgated under the Emergency Price Control Act of 1942 (Act of January 30, 1942, c. 26, 56 Stat. 23, as amended, 50 U. S. C. App. (Supp. V) 901, *et seq.*) and in substance held that such regulations, though effective for all sales, transfers, and

other deliveries, cease to be binding when affected commodities are delivered in obedience to the sovereign power of eminent domain. We submit that, in so holding, the court has laid down a rule which, if upheld, would frustrate the Congressional purpose, expressly declared in the Price Control Act, to stabilize prices and prevent wartime inflation. It would make impossible effective price regulation by the Congress in a wartime economy.

We consider, first, the letter of the 1942 Act. Section 1 (50 U. S. C. App. (Supp. V) 901) makes it clear that the Act was designed not only to protect private purchasers from the inflationary price rises consequent upon the wartime swollen demand, but also to protect the several governments in their capacity as purchaser. That section reads in part as follows:

> It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; *to assure that defense appropriations are not dissipated by excessive prices; * * * to prevent hardships * * * to the Federal, State, and local governments, which would*

> *result from abnormal increases in prices;* * * * and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. [Italics supplied.]

It needs no dissertation to demonstrate that if sellers, like respondent here, had been permitted to avoid the effect of maximum price regulations issued under the Price Control Act simply by withholding their products from purchaser governments, the Congressional purpose expressed above would have been defeated.

More significant than the impact of the Court of Claims' ruling on the 1942 Act, however, is its probable effect on future similar legislative efforts. The Government cannot hope effectively to stem the tide of inflation during wartime if the products involved in its own procurement program must remain free from price control. During a period of war, Government buying dominates the markets. Thus, during World War II, approximately half of our national annual output of some two hundred billion dollars worth of goods and services went to the local, State, and Federal governments, with the Federal Government by far the predominant purchaser. Sixth Report of Director of War Mobilization and Reconversion, April 1, 1946, H. Doc. No. 524, 79th Cong., 2d Sess., p. VI; Eighth Report of Director of War Mobilization and Reconversion, October 1, 1946,

H. Doc. 45, 80th Cong., 1st Sess., p. 7. On January 1, 1945, agricultural products representing about 10% of the Nation's total food supply were being purchased by the Government for Lend-Lease requirements alone. First Report of Director of War Mobilization and Reconversion, January 1, 1945, H. Doc. No. 9, 79th Cong., 1st Sess., p. 34. There is, consequently, little promise of generally restricting prices to reasonable levels during time of war unless the prices on sales to the Government are effectively controlled. Cf. *Yakus* v. *United States,* 321 U. S. 414, 432. And it is no answer to suggest that the importance of the Federal Government as a buyer affords it ample opportunity to dictate prices by economic compulsion and that legal sanctions are therefore superfluous. The exigencies of a mobile and total warfare do not permit time for the play of economic forces, as this very case clearly indicates. See Note, *Legal and Economic Aspects of Wartime Price Control* (1942), 51 Yale L. J. 819, 840–841.[19]

[19] "With the size of Government purchasing reaching astronomical proportions, failure on the part of the Government as a buyer to adhere generally to established price ceilings can nullify the beneficial effects of price fixing. Fortunately, the inflationary tendency of numerous uncoordinated Government purchasers which featured the last war effort has been largely avoided. But even assuming an integrated buying organization, the pressure to spend prodigious sums of money in a hurry and necessity for speedy procurement creates a situation in which some neglect of price ceilings may be inevitable." 51 Yale L. J., at 840–841.

The same commentator also remarks: "Where there is a

Nor can it be said that the dire consequences envisaged are remote and speculative possibilities, unlikely ever to occur. Of course, price regulations fair and equitable to each and every one of the innumerable persons concerned would discourage "hold-ups" of the Government. But assuring that maximum prices will be fair and equitable to all individuals, if at all feasible, is so difficult a task that Congress and this Court have recognized the inadvisability of making such assurance a test of the validity of maximum price regulation. See *Bowles* v. *Willingham*, 321 U. S. 503, 516–519. Again, the patriotism of the great preponderance of our suppliers will not generally countenance refusing the Government's urgent demands for goods at prices equal to those available in the open market. Such patriotic cooperation, however, depends in large measure upon the impartial treatment of all involved and cannot long endure when certain suppliers are permitted to recover more from the Government than the ceiling prices under which others similarly situated are compelled to ply their trade, incurring losses equal to those which may have been suffered by respondent.

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price ceiling in operation, it is inconsistent with a policy of price control for a seller whose goods have been requisitioned to obtain a price higher than the ceiling." 51 Yale L. J., at 840, fn. 102. Also of the same view is Marcus, *The Taking and Destruction of Property under a Defense and War Program* (1942), 27 Cornell L. Q. 476, 528–530.

We do not wish to be misunderstood. We are fully aware that the determination of just compensation for property taken by the sovereign is a matter for the judiciary. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312. We do not urge a departure from that rule. We say only that here, where the market prices in a ready market existing at the time and place of the requistion are equivalent to the O. P. A. ceiling prices, there is not only no reason to disregard those ceiling prices, but every reason to accept them as the measure of just compensation.[20] Acceptance of those prices in such circumstances can hardly be stigmatized as a capitulation to legislative and executive usurpation of the judicial power.

As Judge Learned Hand said, in giving full effect to wartime regulation in the condemnation proceeding of *United States* v. *Delano Park Homes, Inc.*, 146 F. 2d 473, 474 (C. C. A. 2):

> We cannot agree that the judge should have refused to consider the effect of "priorities." Nobody suggests that an owner whose land is not condemned, has any claim

[20] The Government in this case is seeking merely the application of established standards of compensation. Accordingly, it is not necessary to decide here whether the normal measure of compensation under the Fifth Amendment may in some situations, at least, be inapplicable to a taking in effectuation of the war power. Cf. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305; *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 405–406.

upon the United States because he cannot employ it profitably until the system ends. Yet to appraise the land without any deduction for a period during which it will bring in no income, is to reimburse the owner pro tanto; a discount measured by commuting the losses, de die in diem, is necessary to avoid putting into a preferred class owners whose lands happen to be condemned, as against those who must bear the deprivation without relief. Otherwise condemnation will prove a bonanza. * * * Certainly, when an owner can hold his property until the market recovers, it is unjust to allow him only current prices, for presumably he will wait for a recovery before disposing of his goods. Whether the same reasoning applies when he cannot wait, is another question; not decided, so far as we know. However that may be, when competent authority has fixed prices at a maximum, or has denied owners some specific use of their property, it is patently a disregard of its authority, either indirectly to allow a higher price on condemnation, or to allow the price to be figured in disregard of the limitation imposed. * * *

2. The promulgation of Revised Maximum Price Regulation No. 148, establishing ceilings for the sale and purchase of pork cuts, was a valid exercise of the powers vested in the Congress and the Executive. *Yakus* v. *United States,* 321 U. S.

414; *Bowles* v. *Willingham*, 321 U. S. 503. Whatever damages and losses respondent may have suffered as a result of that Regulation are not recoverable under our system of law. *Bowles* v. *Willingham, supra,* at 517–519; *Omnia Commercial Co.* v. *United States,* 261 U. S. 502; *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188. There is no reason why respondent should be compensated for such losses solely because of the accident that its particular products, no more affected by regulation than those of the many other packers, were requisitioned by the Government. Yet that is just what the decision of the court below accomplishes. The additional loss which respondent incurs by replacement of the pork requisitioned (R. 13) is one occasioned not by the taking but by the maximum price regulation. Payment of the ceiling prices would compensate respondent fully for the property taken—those are the prices they would have brought in the market. Such payment would not compensate it for the loss represented by the difference between cost of replacement and ceiling price—but for that, a loss consequent upon valid governmental regulations, it is entitled to no compensation. Certainly it is a palpable injustice to award compensation for impairment of value in favor of respondent, who has refused to sell to the Government, while denying it to the much larger class of packers who have voluntarily supplied the Government and thereby

and in sales for private account have suffered the very same losses as has respondent here. See Note (1946), 60 Harv. L. R. 132, 136–137.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Claims should be reversed, with directions to enter a judgment for respondent in an amount not exceeding $12,556.25, with interest on the amount of $25,112.50 from March 3, 1943, the date of the requisition, to May 22, 1943, the date of the final award made by the Director of the Food Distribution Administration.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 862

THE UNITED STATES, PETITIONER

v.

JOHN J. FELIN & CO., INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

This supplemental brief is submitted in response to questions from the Bench during the argument. It analyzes (1) the legislative history of the amendments to the Act of October 16, 1941, 55 Stat. 742, contained in the Second War Powers Act, 56 Stat. 181, the provision under which the property here in question was requisitioned, and (2) the legislative history of Section 4 (d) of the Emergency Price Control Act, 56 Stat. 28.

Respondent contended, both in its brief and at oral argument, that the amendment to the act of October 16, 1941, and the enactment of Section 4 (d) of the Emergency Price Control Act, evidenced a Congressional purpose to make ceiling

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prices established under the Emergency Price Control Act inapplicable in determining just compensation for property requisitioned under the act of October 16, 1941.

We think that these contentions are wholly without merit; indeed, it would be surprising if Congress were found to have had the purpose to make available compensation in an amount greater than that required by the Fifth Amendment. Our basic position in this case is that respondent is entitled to just compensation under the Fifth Amendment, as determined in accordance with the standards announced by this Court in a long line of decisions, and that in determining just compensation the existence of a legal market (a real, actual and "ready" market) is a pre-eminent factor.

I

LEGISLATIVE HISTORY OF AMENDMENTS TO THE ACT OF OCTOBER 16, 1941 (55 STAT. 742) CONTAINED IN THE SECOND WAR POWERS ACT (56 STAT. 181)

As originally enacted, the Act of October 16, 1941, provided that "Nothing contained in this Act shall be construed * * * (3) to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and which is necessary to the operation of such factory or business." Also, the original Act of October 16, 1941, provided that "The President shall determine the

amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * *, but each such determination shall be made on the basis of the fair market value of the property at the time it is requisitioned * * *."

As the Second War Powers bill was reported to the House of Representatives in February 1942, after the outbreak of the war, Title VI of the bill would have amended the Act of October 16, 1941, by striking from it the prohibition against the requisitioning of machinery or equipment actually in use and which was necessary to the operation of a factory or business. Thereupon, it was pointed out by Representative Hancock and others that if the Act of October 16, 1941, were amended only in this fashion, it would limit the compensation to the fair market value of the machinery or equipment taken, although the loss or damage to the factory or business might be far greater than such an amount. Accordingly, Mr. Hancock introduced an amendment as follows:

> Whenever any machinery or equipment which is in actual use in connection with any operating factory or business, and which is necessary to the operation of such factory or business, is requisitioned pursuant to the act of October 16, 1941 (55 Stat. 742), the owner thereof shall be paid fair and just compensation, which shall not be less than the difference between the

> fair market value of such factory or business before and after the taking of such equipment or machinery.

Although the Hancock amendment was adopted by the House, there was considerable discussion as to whether the compensation formula contained in that amendment was not too rigid. Representative Gwynne, in particular, urged that the measure of compensation should be determined in each case by the courts under a broad standard of "just compensation." 88 Cong. Rec. 1775–1785.

Thus, as passed by the House, Title VI of the Second War Powers Act eliminated the prohibition in the original Act of October 16, 1941, against requisitioning machinery or equipment of a going factory or business, and provided that in such cases compensation should be measured by the difference between the value of such factory or business before and after the taking of such equipment or machinery.

The Conference Committee took a still different view. In the Conference Report, H. Rep. 1896, 77th Congress, 2d Sess. (1942), p. 6, it is stated that—

> This amendment [the Hancock amendment] was made on the floor of the House and proposed that whenever machinery or equipment in actual use, and necessary to the operation of a factory or business is requisitioned, the owner be paid fair and just compensation which shall not be less

> than the difference between the fair market value of such factory or business before and after the taking of such equipment or machinery. The conferees agreed to an amendment in lieu of the House amendment which would rewrite the second sentence of the first paragraph of section 1 of the Requisition Law (act of October 16, 1941) to make it clear that the determination as to the amount to be paid for property requisitioned or returned shall be in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States.

Thus it is clear that the amendment of the Act of October 16, 1941, to provide for compensation "in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States," in lieu of the original provision for compensation "on the basis of the fair market value of the property," was intended merely to provide the courts with a more flexible formula for determining compensation in the situations with which Representative Hancock was concerned. There is absolutely no indication that the amendment was intended to preclude the courts from utilizing market price or market value, as they have done in the past, as a general and usual measure of just compensation.

For the Court's information, we are advised by the Civilian Production Administration (successor to the War Production Board) that, ac-

cording to their records, the Government has on no occasion taken from a plant or business any machinery or equipment which was found to be in actual use and necessary to the operation of such plant or business. We are further advised that the total requisitions of machinery and equipment from plants and businesses in which they were found not to be in actual use or unnecessary to the operation of such plants or businesses totaled approximately $3,350,000, computed on the basis of administrative awards at the lower of market or applicable maximum OPA prices.

II

LEGISLATIVE HISTORY OF SECTION 4 (d) OF THE EMERGENCY PRICE CONTROL ACT (56 STAT. 28)

Section 4 (d) of the Emergency Price Control Act provides that "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

This provision is obviously a saving clause, having no bearing either on the Government's power to requisition under the Act of October 16, 1941, or on the question of the measure of just compensation for goods requisitioned. The legislative history of Section 4 (d) of the Emergency Price Control Act does not indicate that Congress either intended any special restraint upon the requisitioning power or desired in any way to preclude the courts from considering the effect of the legal market, and the prices prevailing

therein pursuant to the Emergency Price Control Act.

The reports of the House and Senate Banking and Currency Committees on the price control bill (H. Rep. No. 1409, 77th Cong., 1st Sess. (1941), p. 8; S. Rep. No. 931, 77th Cong., 2d Sess. (1942), p. 20) merely state that "Section 4 (d) specifically preserves the right of persons to refuse to sell any commodity or offer any accommodations for rent." Section 4 (d) does not appear to have been discussed in either the House or Senate debates. In a memorandum which was filed with the Senate Committee by the Office of Price Administration (as it existed under Executive order) the following statement is made with respect to the Fifth Amendment (Hearings before the House Banking and Currency Committee, 77th Cong., 1st Sess. (1941) on the price control bill, p. 320):

> The fifth amendment of the Constitution provides:
>
> "Nor shall any person * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."
>
> Persons urging constitutional objections may complain that the regulation assailed "takes" their property for a public use, and fails to make "just compensation." Such an argument would ignore the fundamental distinction between "a taking" by

> the Federal Government and a regulation by the Government. It is only when the Government takes the property away from the owner that the just compensation clause of the fifth amendment is applicable. The proposed legislation contemplates only a regulation, not a taking. No person is required either to turn his property over to the Government, or to sell it to a private person at a specified price. In fact the proposed statute specifically provides that nothing contained therein shall be construed to require any person to sell any commodity. Since the owner may choose not to sell his property at any price, the just compensation clause of the Constitution has no application.

See also Hearings before the Senate Banking and Currency Committee on the price control bill, 77th Cong., 1st Sess. (1941), p. 228, fn. 26. The quoted statement speaks for itself. And other relevant comment makes clear that it was felt that the requisitioning power, like wage control, should be the subject of separate legislation. See particularly the discussion between Representative Kunkel and Mr. Leon Henderson during the House Committee hearings (p. 774, 855); between Representative Kunkel and Mr. Bernard Baruch (pp. 1040–1041): and between Representative Kean and Under Secretary of War Patterson (p. 1541).

CONCLUSION

It seems abundantly clear that in the adoption of Section 4 (d) of the Emergency Price Control Act, and of the March 1942 amendment to the Requisitioning Act of October 16, 1941, Congress had no intention whatever to preclude the courts from applying the test of market value in determining just compensation for requisitioned goods, or to preclude them from considering the prices prevailing in the only market operating within the framework of Federal law.

Indeed, if the effect of the Emergency Price Control Act is to be disregarded in determining just compensation, and some special formula is to be applied in order to prevent the Act and its operation from being a factor in that determination, it is difficult to see just where the process of attempting to eliminate the effects of governmental intervention in the economic sphere is to cease. If, in the determination of just compensation, the courts are to disregard the Emergency Price Control Act and its effect, must they not then disregard the Tariff Act and its effects; numerous subsidy acts, designed to increase prices of certain commodities; minimum wage legislation, which may incidentally increase the cost of production; legislation affecting transportation rates, and a host of others?

Market price is a resultant of many factors. Pertinent legislation of many kinds enters into that final result. Here a valid act of Congress, designed to create fair and equitable market conditions in time of war, certainly cannot be disregarded. The Act and the prices prevailing in the markets operating within its framework have direct and immediate bearing upon the question of just compensation.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MAY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. [redacted] 17

THE UNITED STATES, *Petitioner*

v.

JOHN J. FELIN & CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

MEMORANDUM FOR THE RESPONDENT.

The primary question presented in this case is whether the maximum prices prescribed by regulation of the Office of Price Administration constitute a controlling measure of just compensation under the Fifth Amendment to the Constitution where private property was requisitioned by the United States. The Court of Claims found in the present case that the value of the property was higher than the prescribed maximum prices in effect at the time of the requisition and gave judgment to respondent on basis of the court's independent determination of value.

We believe that the Court of Claims was clearly right in holding that respondent is entitled to compensation on basis of value and that recovery is not limited to the maximum "market prices" prescribed by the Price Administrator when such prescribed prices were lower than the actual value. However, in view of the importance of the question we do not oppose the granting of the writ sought in the petition.

Respectfully submitted,

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FREDERICK E. BROWN
ARTHUR L. WINN, JR.
Attorneys for Respondent.

February, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 862 17

THE UNITED STATES, *Petitioner*,

v.

JOHN J. FELIN & CO., INC.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, 1946.

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On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the Court of Claims (R. 12-14) is reported at 67 F. Supp. 1017.

JURISDICTION.

The judgment of the Court of Claims was entered on October 7, 1946 (R. 15). The petition for a writ of certiorari was filed on January 7, 1947, and was granted on March 3, 1947 (R. 16). The jurisdiction of this Court rests upon Section 3(b) of the Act of February 13, 1925, as amended.

Statute Involved.

The statute involved is the Act of October 16, 1941 (c. 445, 55 Stat. 742) as amended by the Act of March 27, 1942 (c. 199, 56 Stat. 181), the pertinent provisions of which in effect at the time of the requisition are set forth in the Appendix to this brief.

Question Presented.

Whether in a suit for just compensation under the Fifth Amendment, brought by the owner of pork cuts requisitioned by the United States, compensation may justly and fairly be measured by maximum selling prices prescribed by the Price Administrator when such prices—

(1) would not buy the products in the market,

(2) were below the cost of production and below the value of such cuts reflected by the live hog market,

(3) were less than willing buyers and sellers would have fixed as the value in the absence of governmentally prescribed maximum prices,

(4) were the subject of general protest by the meat packing industry as unfair and unreasonable and below the actual value of the products, and

(5) were so low that, as found by the Price Administrator, if continued without the grant of relief "many pork packers would be forced sharply to curtail their kill or discontinue it entirely" because of the losses imposed;

or whether just compensation requires an award equivalent to the actual value of the property requisitioned as disclosed by the cost at which these staple and commonplace pork cuts were readily replaced in the regular course of business by the slaughter and conversion into cuts of live hogs purchased in the free and general market where the Price Administrator had seen fit to leave prices and value to be freely determined by willing buyers and sellers.

Statement.

The statement of the case in petitioner's brief, while accurate in the detailed statements, fails to deal with the central part of the case, namely, the actual value of respondent's products and the extraordinary character of the so-called "market prices" which the petitioner urges this Court to accept as the measure of just compensation under the Fifth Amendment. It is necessary, therefore, for respondent to supplement the statement made in petitioner's brief.

The so-called "market prices" urged by petitioner were not the result of trading by willing sellers and willing buyers in a free market and lacked all the attributes of prices so determined. These "market prices" did not represent anyone's opinion as to the *value* of the products. They were merely the maximum selling prices prescribed by the Price Administrator in Revised Maximum Price Regulation No. 148 and Amendment 1 thereto, covering wholesale pork cuts (Fdg. 11 and 12, R. 7-8). Sales at higher prices were made unlawful and subject to criminal penalties (Fdg. 12, R. 7-8). Such maximum prices had been originally established March 23, 1942, based on prices prevailing during the period March 3, 1942 to March 7, 1942. Prices at the same level were continued in effect and were being maintained by Revised Maximum Price Regulation No. 148 and Amendment 1 thereto at the time respondent's property was requisitioned one year later on March 3, 1943 (Fdg. 12, R. 7-8).

The principal item in the cost of producing pork cuts is the cost of live hogs from which they are derived (Fdg. 11, R. 7). In the period March 3, 1942 to March 7, 1942, employed as the base price period, the average price of live hogs at Chicago was $13.15 per cwt. Chicago is one of the largest hog markets in the country. That market provides the basic quotations in the packing industry and such prices are generally used for arriving at prices in other market centers (Fdg. 13, R. 8). No maximum prices had been pre-

scribed for live hogs, the prices being left to be determined by the free trading of buyers and sellers. Within the first month after pork cut prices were imposed, the average price for live hogs had increased to $14.03. The price trend continued upward, and although there was a price decline during the heavy marketings in November and December, 1942, the price started rising again in the latter part of December, 1942 and reached an average of $15.59 per cwt. during March, 1943. For the week ending March 6, 1943, in which the requisition took place, the Chicago average price was $15.60 per cwt., the highest price level attained since October 1920 (Fdg. 13, R. 8).

The maximum prices maintained by the Price Administrator on products derived from live hogs were during February and March, 1943, less than the market prices of live hogs. The Court of Claims found:

> "During the months of February and March 1943 the wholesale prices for products derived from live hogs were, as shown by the published reports of the Department of Agriculture, less than the market prices of live hogs." (Fdg. 14, R. 8).

The Director, War Food Administration, charged by the President of the United States with full responsibility for the Nation's food program in order to assure an adequate supply and distribution of food to meet war and essential civilian needs (Fdg. 14, R. 8; Fdg. 2, R. 5), issued on April 10, 1943 an official public statement referring to the "continued 'squeeze'" between the price of live animals and the wholesale prices of products and "the exceptionally acute situation resulting from present relatively high hog prices." The announcement contained the following statement (Fdg. 14, R. 8-9):

> "Current prices for livestock are above the levels reflecting a proper relationship to the existing wholesale meat ceilings."

After reciting that the meat rationing program, "together with vigorous enforcement measures which are de-

signed to keep meat supplies moving through legitimate trade channels," were expected to result "in lower prices for all classes of livestock as these programs become fully effective," the statement continued:

> "However, if these measures do not result in a downward adjustment in hog prices in a reasonable time, it will be necessary to adopt ceiling prices on live hogs. In view of the exceptionally acute situation resulting from present relatively high hog prices, procedures for placing ceiling prices on hogs are now being worked out for use if and when necessary. Recent hog prices have been $1.00 to $1.50 per cwt. above levels reflected by current wholesale pork ceilings."

Ceiling prices on live hogs were finally imposed by the Price Administrator six months later by the promulgation of Maximum Price Regulation No. 469, issued September 11, 1943 and effective October 4, 1943 (Fdg. 15, R. 9). The Price Administrator, in his statement of considerations involved in the issuance of this regulation, after referring to the regulation fixing maximum prices on wholesale pork cuts and the rise in hog prices since March, 1942, made the following finding:

> "However, the hog price continued to rise, the average reaching $14.99 in August [1942], with a top of $15.30. It became clear that this increase was causing some packers to sell at a loss under their wholesale pork ceilings and that, if prices continued to rise, or even remained at August levels, many pork slaughterers would be forced sharply to curtail their kill or to discontinue it entirely."

After reciting the price history of live hogs for the following year, the tendency of prices to rise above $15.00 per cwt. except for short seasonal periods, and the failure of indirect controls—wholesale and retail price ceilings, rationing and slaughter restrictions—to restrain hog prices, the Price Administrator stated his conclusion that maximum prices for hogs were necessary (Fdg. 15, R. 9-10).

At the time respondent's pork cuts were requisitioned the average price of hogs had increased to $15.60 per cwt., well above the $15.00 level at which the Price Administrator found losses would force packers "sharply to curtail their kill or to discontinue it entirely."

The maximum prices on pork cuts maintained by the Price Administrator were the subject of general protest by the meat packing industry in both 1942 and 1943. On several occasions in this period protests were made on behalf of 650 meat packing company members of the National Independent Meat Packers Association, of which respondent was a member. Respondent individually filed a formal protest on July 17, 1942, and again on March 18, 1943 (Fdg. 16, R. 10).

Respondent's protests were denied by the Price Administrator in orders and accompanying decisions on April 23, 1943 and July 5, 1943 (Fdg. 17, R. 10). The grounds given by the Price Administrator for the dismissal are not set forth in the findings or decision of the Court of Claims but are quoted, in part, by petitioner as found in the decision of the Price Administrator (Pet. Brief, p. 27). The ground of dismissal by the Price Administrator of respondent's protests and the protests of 130 other packing companies,* as more fully shown by the decisions on the protests, was that the increase in hog costs did not warrant any change in the maximum prices for pork products. In the decision of July 5, 1943 it was said that the only basis on which any change in pork prices would be made was a showing of need for higher prices—

> "... in terms of the over-all financial position of the industry."

The Price Administrator found that the protestants had not shown that the packing industry as a whole needed in-

---

* Decision issued April 23, 1943, *Rapides Packing Co. et al.*, Docket No. 1148-2-P, and decision issued July 5, 1943, *Greenwood Packing Plant et al.*, Docket No. 1148-188-P.

creased earnings when all operations of the entire industry were taken into consideration, and on this basis dismissed the protests. In his decision the Price Administrator also referred to various controls which were being imposed or had been imposed which he then believed might restore a fair relationship between the ceiling prices and live hog costs. Among the other controls mentioned which it was then hoped would eliminate the price squeeze were—

Rationing of consumers effective March 29, 1943 (Ration Order No. 6, 8 F. R. 3591);

Licensing of all dealers in livestock and all slaughterers;

Limitation of slaughter by packers for civilian distribution by means of quotas (Food Distribution Orders Nos. 27 and 28, 8 F. R. 2785 and 2787);

Establishment of dollars and cents ceiling prices for retail sales of pork products, effective April 1, 1943 (8 F. R. 2859);

Vigorous enforcement program against black market operators, with 10,000 investigations, 1,000 enforcement proceedings, and 1,300 defendants.

The decision stated:

"Purchase of live animals by black market operators have been at prices which ignored maximum prices established for dressed pork and wholesale cuts. The effect of this competition on live prices has been greater than its volume would appear to warrant. Enforcement of maximum prices and quota limitations will restore normal competitive relationships in the live market and permit acquisitions of supplies at price levels consistent with maximum prices established. Altogether, cooperation of the industry, exercise of the administrator's authority and that of the other government agencies dealing with this problem, are aimed at control of prices in a manner which will effectuate the purposes of the Act to prevent inflation."

Before two months had elapsed the Price Administrator had concluded that with hog prices at $15.00 per cwt. the established maximum prices for pork products would force many slaughterers "sharply to curtail their kill or to discontinue it entirely." Ceiling prices on hogs were therefore issued September 11, 1943 (Fdg. 15, R. 9). Hogs were costing on the average $15.60 when respondent's products were requisitioned (Fdg. 13, R. 8).

During the period in which respondent's products were requisitioned, the so-called "market prices" for pork cuts as found in the maximum price regulation of the Price Administrator would not buy the products in the market. Respondent attempted to purchase pork cuts in the market to replace those requisitioned but was unable to do so. The Court of Claims found that the only means whereby respondent might obtain these products was through the purchase and slaughter of live hogs (Fdg. 19, R. 11). The Food Distribution Administration, as purchasing agent for various Government departments and agencies, was having difficulty in obtaining its requirements (Fdg. 18, R. 10-11). The record discloses no purchases by the Government in the market or without the aid of compulsory orders. During February and March, 1943 the Food Distribution Administration was procuring meat by issuing to each packer operating under Federal inspection a priority order calling for a proportionate part of the total quantity needed at the time. These priority orders had the effect of requiring packers to fill them prior to the filling of other orders (Fdg. 3, R. 5) and wilful failure to observe them was subject to criminal prosecution.* However, the difficulty in getting pork products was so great that on March 13, 1943, the Director, Food Distribution Administration, issued an order which required each slaughterer subject to Federal inspection to set aside for government use 45 percent of all pork and designated percentages of other meat derived from the

* Title III of the Second War Powers Act (Act of March 27, 1942, c. 199, Title III, Sec. 301, 56 Stat. 177; 50 U. S. C. App. Supp. II, 633). See Petitioner's brief, p. 5, footnote.

slaughter of hogs and other livestock (Fdg. 18, R. 10-11). Disregard of this order was also punishable as a crime.**

The Government was unable to show the court below any ready or willing sellers *of pork cuts in the market at the maximum prices maintained by the Price Administrator.* The Court of Claims did find that at the time of the requisition "there was a ready market for such products in Philadelphia" (Fdg. 20, R. 11) but this means only that there were willing *buyers.* The finding as to a "ready" market must be read with the court's other finding that respondent was unable to purchase pork cuts in the market at the same time although it sought to do so. (Fdg. 19, R. 11) In addition, the finding of a "ready" market must be read along with the further findings that there existed "an acute shortage of pork products available for the civilian population" and as to the compulsory methods being employed by the Government to obtain these products (Fdg. 18, R. 10-11).

Respondent readily conceded, and the Court of Claims found, that prior to and after the requisition it regularly sold pork cuts at the established maximum prices (Fdg. 20, R. 11). Respondent did this, not because it considered such prices reasonable or fair (it had formally protested them as unreasonable), or because it did not consider the products to have a greater value, but because they were the highest legal prices which it was allowed to charge its customers. The company did not continue operations in order to obtain the allowable maximum prices for pork products but for other reasons found by the court as follows (Fdg. 20, R. 11):

> "Throughout the period mentioned, plaintiff continued to buy live hogs at prevailing prices and to sell pork products derived from them at the ceiling prices authorized by regulations of the Office of Price Administration, even when the cost of live hogs was

** This set-aside regulation was issued by the Director, War Food Administration, under authority of the Second War Powers Act (cited next footnote, *supra*), Executive Order No. 9280 (7 F. R. 10179) and Executive Order No. 9334 (8 F. R. 5423).

> greater than the wholesale prices of the products obtained from them. Plaintiff chose to do this in order to protect its good will and the investment in its business, in order to supply customers who were dependent on it and in order to retain its organization of plant and company employees at a time when the labor situation in Philadelphia was very tense."

There is no finding by the court below that respondent, the Price Administrator, or anyone else, considered the value of respondent's pork cuts to be no greater than the prescribed maximum prices or that the value was less than the cost of obtaining them by the purchase and slaughter of live hogs. In fact, the value of pork cuts was contemporaneously being expressed by the free trading of willing sellers and willing buyers in the general live hog market, the only place in which such cuts were obtainable. Pork cuts were readily obtainable by respondent in the regular course of business by the purchase and slaughter of live hogs. The award to respondent by the Court of Claims is based upon the cost at the time of requisition of obtaining the requisitioned products in the regular course of business by the slaughter of live hogs purchased in a free and fair market.

The Government seeks a valuation of the requisitioned products at $25,112.50, which is less than the highest "market price" allowed by the Price Administrator. (Pet. Brief, pp. 21, 42) This is produced by taking the applicable maximum prices and subjecting them to a deduction of $1.00 per cwt. for sales in carload quantities, as provided by the price regulation for voluntary sales. Respondent customarily sold its products in lots of less than 500 pounds each, for which the Price Administrator had provided higher "market prices." Its customers were approximately 5,000 retail meat dealers located in the Philadelphia area, which it served by means of 57 route trucks. In lots of less than 500 pounds, the applicable maximum prices under the regulation aggregated $26,362.50 for the requisitioned products (Fdg. 22, R. 11-12). The award by

the Court of Claims, based on the cost of obtaining the cuts by the purchase and slaughter of live hogs, was $30,293 (Fdg. 19, R. 11).

The petition was filed in the Court of Claims on June 24, 1943 (R. 1).

Summary of Argument.

1. The determination of just compensation under the Fifth Amendment is a judicial function not subject to control or limitation by regulation of the Price Administrator.

2. The rule of employing market price in measuring just compensation can be applied only where it is judicially determined that such market price or prices provide "the full money equivalent of the property taken" and place the owner "in as good position pecuniarily as it would have occupied if its property had not been taken." *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343.

3. The so-called "market prices" maintained by the Price Administrator on the requisitioned products were less than their actual value and were less than the "full money equivalent of the property taken." The prescribed prices expressed no one's opinion of the actual value of the pork cuts. Such prices would not buy the products in the market. They were below the value which willing sellers and willing buyers would have established in a free and fair market. They were below cost of production although demand for pork cuts far exceeded the supply. In the face of heavy demand for products the prescribed prices imposed such heavy losses on slaughterers as to threaten to force them to discontinue operations. These prices were substantially less than the price and value which willing buyers and willing sellers were placing on these products contemporaneously in free trading in the general live hog market where pork cuts were readily available to respondent in the regular course of business.

4. The "full money equivalent" of the requisitioned pork cuts is measured with logical and mathematical exactness

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4. The "full money equivalent" of the requisitioned pork cuts is measured with logical and mathematical exactness

by the cost at which these staple and commonplace products were readily replaced by respondent in the regular course of business by the purchase and slaughter of live hogs. The "money equivalent" of a staple and commonplace article, *readily replaceable*, is demonstrated by the cost of replacement in the regular course of business. Any award of less than this replacement cost would fail to place respondent "in as good position pecuniarily as it would have occupied if its property had not been taken."

5. This Court has held in many cases that replacement cost is to be considered in arriving at value. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 124-125. It has also held that where two markets exist the owner is entitled to the value in the higher of the two markets. *United States* v. *New River Collieries Co.*, 262 U. S. 341. This latter rule would seem to apply with special force here when the so-called "market prices" prescribed by the Price Administrator for one market would not buy the products whereas the products were readily available in the second market at prices determined by the free trading of willing sellers and willing buyers.

6. The ruling of the Court of Claims in this case and respondent's position here cannot embarrass the Congressional purpose as expressed by the Emergency Price Control Act of 1942. Congress expressly excluded requisitioned property and compulsory sales from the terms of that Act.*

The "market price" prescribed by the Price Administrator cannot control or limit the independent judicial determination of just compensation under the Fifth Amendment.

The argument for petitioner is that the "market price" imposed by the Price Administrator determines and controls the measure of just compensation. If this argument

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* "Nothing in this Act shall be construed to require any person to sell any commodity . . ." (c. 26, title I, sec. 4, 56 Stat. 28; Supp. II (1942), U. S. Code, title 50, sec. 904).

be accepted the guarantees of the Fifth Amendment have been effectively set aside and suspended by regulation of the Price Administrator and the judicial function may be exercised only within the limits allowed by the Price Administrator. The contention cannot be seriously entertained. It is too long and well established, as fundamentals of our government, *first*, that the guarantees of the Fifth Amendment are not suspended in time of war** and, *second*, that the determination of just compensation under the Fifth Amendment is a judicial function not subject to control by the legislative or executive departments.*** "The ascertainment of compensation is a judicial function, and no power exists in any other department to declare what the compensation shall be, or to prescribe any binding rule in that regard." *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343-344. This Court in passing upon the validity of a price regulation for a general class was careful to point out that the case before it did not involve a "taking of property" by the Government. *Bowles* v. *Willingham*, 321 U. S. 503, 517. By doing so the Court put to one side the different question which would arise in such a case and reserved for determination whether a different rule should apply.

It was not the intention of Congress that the prices prescribed by the Price Administrator should govern in the requisition of property or in compulsory sales. This is shown on the face of the Emergency Price Control Act by the following provision:

> "Nothing in this Act shall be construed to require any person to sell any commodity . . ." (c. 26, title I, sec. 4, 56 Stat. 28; Supp. II (1942), U. S. Code, title 50, sec. 904)

This provision is meaningless if, upon requisition, the owner's recovery is controlled by the price fixed by regulation of the Price Administrator.

** *Ex parte Milligan*, 4 Wall. 121; *United States* v. *Cohen Grocery Co.*, 255 U. S. 88.

*** *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 327.

The purpose of Congress is further shown by the amendment of the Act of October 16, 1941, under which the requisition here took place. The statute originally provided that the recovery in case of requisition should be on basis of "the fair market value." (c. 445, 55 Stat. 742; Supp. I (1941), U. S. Code, title 50, sec. 721) The Price Control Act became effective January 30, 1942. Thereafter, on March 27, 1942, the Act of October 16, 1941, was amended, the provision for recovery on basis of "the fair market value" was eliminated, and in lieu thereof it was provided that recovery should be "in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States." (c. 199, 56 Stat. 181; Supp. II (1942), U. S. Code, title 50, sec. 721)

The extended argument in petitioner's brief (pp. 33-41) to the effect that the decision below disregards the Emergency Price Control Act of 1942, "frustrates the Congressional purpose," and "would render impossible the maintenance of any effective price control system," is conclusively answered by the actions of Congress in placing requisitions and compulsory sales outside the scope of the Price Control Act and by the amendment of the requisitioning Act of October 16, 1941. By these actions Congress took affirmative steps to assure observance of the guarantees of the Fifth Amendment.

"Market price" is not acceptable as a judicial measure of just compensation unless it qualifies as the "full and perfect equivalent" in money of the property taken.

The guarantee of the Fifth Amendment is that *just* compensation shall be paid. The judicial function, therefore, involves more than a clerical determination of market price and the automatic acceptance of such determination as the measure of compensation. The argument for the Government is, in substance, that the determination of market price ends the inquiry without any investigation to determine whether such price represents *actual* value and, therefore,

just compensation. The limited and mechanical inquiry urged on behalf of the Government disregards the basic requirement that the compensation shall be the "full and perfect equivalent" in money of the property taken and that the owner shall be fully indemnified so as to place him in as good a position "as he would have been in if his property had not been taken." *United States* v. *Miller*, 317 U. S. 369, 373. It is only where "market price" satisfies this basic requirement that it can be employed as a judicial measure of just compensation under the Fifth Amendment.

For convenience and as a practical measure of actual value, the courts have accepted and employed market value in numerous cases as the measure of just compensation under the Fifth Amendment but the Government's brief has failed to cite any case in which such market price or value was employed where it did not represent actual value and the full and perfect equivalent of the property taken. We know of no case in which the market price or value has been employed where, in fact, it did not represent the full and perfect equivalent of the property taken. In *United States* v. *Miller, supra*, 373-374, this Court said:

> "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value,' the 'market value,' and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value,' which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given,' or, more concisely, 'market value fairly determined.' "

It will be observed from the quotation that the Court emphasized the use of a price or value arrived at "in fair market conditions." Underlying the use of market value as a fair measure of just compensation is the common

knowledge that in a *free* market composed of willing sellers and willing buyers there occurs a practical and realistic appraisal of actual value. A market price or value under conditions where sellers and buyers do not appraise the true and actual worth of a commodity cannot be accepted as a measure of actual value; and this is particularly true, as in the present case, where prices are by government order held below the cost of production for a substantial period. It is common knowledge that producers of goods do not produce goods for the purpose of selling them at a loss. This is not a case where market conditions and the relation of supply to demand have forced selling prices below the cost of production so that the actual worth and value of the product is below the cost of production. On the contrary, demand far exceeded the supply. The facts here make the conclusion inescapable that prices were below the cost of production only because of the Price Administrator's regulation which made sales unlawful at any higher prices and criminal penalties would be imposed where sales were made at higher prices which producers and buyers considered representative of the actual value of the products.

In *United States* v. *New River Collieries Co.*, 264 U. S. 341, two sets of market prices were involved, those in the domestic market and those for the export market. This Court rejected the lower domestic market prices because they did not provide the monetary equivalent of the property taken or fully indemnify the owner. (pp. 344-345)

The decision of this Court in *Vogelstein & Co.* v. *United States*, 262 U. S. 337 is instructive. In that case the plaintiff sought to recover from the government on the ground that the market price for his copper was a mere "fiat" price and he should have a higher price. The Court, however, affirmed the judgment of the Court of Claims that the market price did, in fact, represent the actual value of the copper although the market price had been fixed by *agreement* between the War Industries Board and copper pro-

ducers. This Court examined the facts in some detail, pointed out that the plaintiff had actively participated with other copper producers in agreeing to the market price set in the agreement and that the price so agreed on prevailed uniformly during the period when the plaintiff's property was taken. There was not involved in the *Vogelstein case* any regulatory order or fiat price imposed by the government contrary to and against the will of the sellers. On the contrary, the market price was the price agreed to by the sellers and fixed as the uniform price with their consent. There was no contention or suggestion that the price so agreed on was not satisfactory to the producers generally. The reasoning of the Court in that case and the basis of its decision clearly imply that a "market price" imposed without the agreement of the sellers and, in fact, against their will, at a level below the cost of production could not be accepted as a measure of just compensation. The Court rested its decision squarely on the finding that the market price was satisfactory to the sellers as well as the Government.

In the brief for the Government there is no attempt to show that a fair market condition existed at the time plaintiff's property was taken. All the Government has to go on is the fact that in making sales to its own customers plaintiff was unable to charge any more than the maximum price allowed by the Price Administrator. The reasoning here is in a vicious circle:

1. Plaintiff could not under government regulation sell his products for more than was allowed by the Price Administrator.

2. The plaintiff did not close his plant but continued to make sales at the prescribed maximum prices.

3. By so selling his products the plaintiff established such maximum prices as the measure of "just compensation" under the Fifth Amendment.

Under this reasoning the regulation of the Price Administrator, however confiscatory, operates to override the Fifth Amendment.

Just compensation rests on equitable principles and equity and fair dealing are inherent in its determination. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304. Under the argument advanced for the Government the prescribed "market price", above which respondent was not allowed to sell its products to its customers, would be employed as the measure of just compensation regardless of the justice or injustice of such maximum government-prescribed prices. The Government could impose a maximum price and however unfair and confiscatory it might be it would be accepted as the measure of just compensation, because, forsooth, it was the "market price."

The "market prices" prescribed by the Price Administrator do not qualify as the full and perfect equivalent in money of the property requisitioned.

The "market prices" maintained by the Price Administrator at the time of the requisition lacked all those attributes required to make them judicially acceptable as a measure of just compensation. They did not represent the judgment of anyone as to the value of the products. They were not the result of trading by willing sellers and willing buyers in a free or fair market. In fact they were maintained, with the aid of criminal penalties, to prevent sellers and buyers from fixing the value of the products in their trading. The petitioner contends on brief (pp. 20-21) that the value of a commodity is "what it will bring". Here the Government through the Price Administrator, forbade owners of pork cuts to determine what they would bring and enforced the prohibition with criminal penalties.

It was not the policy or purpose of the Price Administrator to determine the worth or value of commodities and to change his maximum prices as the value and worth fluctuated. On the contrary, it was the policy of the Price Administrator to prevent increases in prices above those prescribed regardless of changes in value of such commodities.

Aside from supply and demand, the most basic consideration in the valuation of a staple commodity, such as meat, is replacement cost. Such cost, as well as supply and demand, were completely disregarded by the Price Administrator in his continued maintenance of the original maximum prices on pork cuts in spite of substantial increases in live hog costs which required sales of pork cuts to be at a substantial loss. This policy was applied in his dismissal of the protests against the regulation filed by respondent and 130 other packing companies. (See *supra*, p. 6)

The unacceptability of such "market prices" as a measure of just compensation is conclusively demonstrated by the single fact that an offer of such prices in the market would not buy the products. Respondent sought in vain to buy them in the market. The Government itself was unable to obtain the products by an offer of such "market prices." It was forced to employ compulsory priority and set-aside orders, backed by criminal penalties, in order to obtain its requirements.* The unavailability of offerings at the Price Administrator's "market prices" is readily explained by the fact that such prices were below the cost of production for the industry as a whole as shown by the reports of the Department of Agriculture published at the time and by the public announcement of the Director, Food Distribution Administration. The price "squeeze", as stated by the latter, was "exceptionally acute" (Fdg. 14, R. 8-9). The Department of Agriculture reported not only that the prescribed prices were below the cost of production but that "the wholesale prices for products derived from live hogs were less than the market prices of live hogs." (Fdg. 14, R. 8) Even the Price Administrator formally found that with hog costs at $15.00 per cwt. the heavy losses under the prescribed maximum prices would force many pork

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* Similar compulsory orders have been held by this Court to be takings by eminent domain. *Liggett & M. Tobacco Co.* v. *United States*, 274 U. S. 215.

slaughterers "sharply to curtain their kill or to discontinue it entirely" (Fdg. 15, R. 9). At the time respondent's products were requisitioned the average price of hogs was $15.60 per cwt. (Fdg. 13, R. 8)

If such "market prices" be accepted as the measure of just compensation under the Fifth Amendment there would seem to be no limit to the injustice which might be done a citizen by the Government in the confiscation of private property.

The fact that respondent both prior to and after the requisition continued to buy live hogs at prevailing prices and to sell pork products derived from them at the prescribed maximum prices, "even when the cost of live hogs was greater than the wholesale prices of the products obtained from them" (Fdg. 20, R. 11), does not show that respondent considered the pork cuts worth only the price received for them. Respondent had formally protested to the Price Administrator that the prices were unfair and unreasonable (Fdg. 16, R. 10). Its conduct would have placed such a valuation on the products only if its primary purpose had been to obtain such money as the prescribed maximum prices would produce. But this was not the purpose of respondent's conduct. It continued operations instead of closing its plant "in order to protect its good will and the investment in its business, in order to supply customers who were dependent on it and in order to retain its organization of plant and company employees at a time when the labor situation in Philadelphia was very tense" (Fdg. 20, R. 11). Its sales of products at the maximum prices permitted by the regulations cannot be interpreted as evidence that respondent considered its products worth no more.

In view of the fact that demand for pork cuts far exceeded the supply and the cost of live hogs reflected prices for pork cuts above the prescribed maximum prices, it is self-evident that had pork slaughterers, including respondent, been free to charge what willing buyers would have paid in a free market, prices for pork cuts would have been

higher than those maintained by the Price Administrator. and would not have been less than reflected by the live hog market. The black market activities referred to by the Price Administrator in his decision dismissing the protests (*supra*, p. 7) support this conclusion. The formal protests of 130 packers and general protests of and on behalf of hundreds of packers against the prescribed prices also demonstrate that in the opinion of the industry the actual value of pork cuts was greater than the maximum prices being maintained at the time of the requisition.

The argument for the Government rests squarely upon the narrow fact that respondent could not sell its products to its customers for more than the maximum prices prescribed by the Price Administrator without risking criminal prosecution. The argument runs that if this is all the products could be sold for, this is all the products were worth. This ignores entirely the reason and purpose of such sales by respondent. If respondent was not to close its plant, jeopardize its investment, discharge its employees, abandon its thousands of customers, and suffer the disastrous loss attending the closing of a large and established business, it was compelled to continue operations. In continuing to operate it was forced to sell its products at not more than the maximum prices prescribed by the Price Administrator. It did not continue operations and produce and sell pork cuts for the purpose of obtaining the maximum prices allowed by the Price Administrator which were less than the cost of production. It did so in the hope of obtaining relief from the below-cost prices of the Price Administrator and in order to prevent the even greater losses which would have resulted from a closing of its plant.

Respondent is entitled to the full and perfect equivalent in money of the products taken. Here this is readily and necessarily measured by the replacement cost.

When valuing a commonplace staple commodity which is readily replaced we have a handy and exact measure of value, namely, the cost of replacement. This measure is satisfactory on both logical and equitable grounds. It measures perfectly the pecuniary equivalent of the property taken. It places the owner in as good a position as he would have occupied if his property had not been taken. In the present case we have involved commonplace staple products, pork cuts derived from hogs. They were readily replaced in the regular course of business by the purchase and slaughter of live hogs. The cost of replacement in the regular course at the time of requisition measures with mathematical exactness the pecuniary equivalent of the products taken. Any lesser award would not be the full and perfect equivalent of the property taken and would not place respondent in as good a position as it would have occupied if its property had not been taken. The rule is eminently fair to the Government. It is asked to pay no more than the cost of production with no other or additional elements of value.

In applying this rule in the present case the Court would be giving consideration to the market value of pork cuts as reflected in the general hog market where prices and values were freely and fairly determined by willing sellers and willing buyers. That market was the only one existing at the time of the requisition which might be described as providing fair market conditions. The rule therefore accords with the traditional judicial practice of employing, when available, the concept of fair market value. However, replacement cost has on numerous occasions been considered by this Court in determining value for judicial purposes. As was stated in a "just compensation" case, *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 125:

> "This Court has held in many cases that replacement cost is to be considered in the ascertainment of value, but that it is not necessarily the sole measure of or guide to value."

This Court there quoted (pp. 124-125) the following from *Re Mersey Docks & Admiralty Comrs.* (1920), 3 K. B. 223, 233:

> "... (claimant) is entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1917, replaced by the Admiralty. As it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials which has continued up to the present time."

On either the concept of "fair market value" or "replacement cost", the award of the Court of Claims was correct and should be affirmed.

In petitioner's brief (pp. 12, 17, 18) it is contended that the value of the property determined by the Court of Claims rests "solely on the peculiar value which the property taken had to respondent personally" or on the "special value" of the products to respondent. This is erroneous. The value of the property taken was determined by the Court on basis of the cost of live hogs in the free and general live hog market, national in scope (Fdg. 19, R. 11). The market price of live hogs was not determined by any "special" value "peculiar" to respondent but by the free trading of willing buyers and willing sellers, almost countless in number, dealing in this national market.

Petitioner's argument for "market prices" reduced by a discount is inconsistent and untenable.

The argument for the Government is that just compensation should be measured by the "market prices" which respondent would have received under OPA regulations had sales been made to its customers. But in contending for an award on basis of a market price of $25,112.50 the Government is forced to discount the lowest prices which respondent need have accepted under the price regulation by an amount of $1.00 per cwt.

Respondent customarily sold its products in quantities of less than 500 pounds (Fdg. 22, R. 11-12) and there was no provision in the price or other regulations of the Price Administrator which prevented respondent from making sales only in such quantities as it might choose. The "market price" under the OPA price regulation for the requisitioned products when sold in quantities of less than 500 pounds was $26,362.50. This amount is reduced to $25,112.50, the price contended for by the Government, by applying a carload discount of $1.00 per cwt. provided by the price regulation. The theory here is that under the applicable OPA regulation a discount was required for voluntary sales in carload quantities and a similar discount should be imposed upon forced requisitions in carload quantities.

It is seen that the real argument for the Government is that the OPA maximum prices should be imposed in case of requisition regardless of the actual value of the products and regardless even of the "market price" which the Price Administrator's own regulations allowed the owner to obtain for his products. This is plainly inconsistent with the primary proposition of the Government's argument, namely, that the owner is fully compensated when he receives the OPA price which he might have obtained on sales to other purchasers. Respondent was admittedly free to sell the requisitioned products in small quantities and obtain not less than $26,362.50; but for the

Government it is contended that this "market price" should be discounted $1.00 per cwt. because the Government chose to requisition in large quantities and the OPA regulation provided a reduced price for voluntary sales in carloads.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment of the Court of Claims should be affirmed.

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April 29, 1947.

APPENDIX.

Act of October 16, 1941.

Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 20, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24(20) and 145 of the Judicial Code (U. S. C., 1934 ed., Title 28, secs. 41(20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * * (c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181)

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1947.

The United States, Petitioner,
v.
John J. Felin & Co., Inc.

On Writ of Certiorari to the Court of Claims.

[June 14, 1948.]

Mr. Justice Frankfurter announced the judgment of the Court and delivered an opinion in which The Chief Justice and Mr. Justice Burton concurred.

This is a claim for just compensation, based on the Fifth Amendment, by a slaughterer whose meat products the Government requisitioned for war purposes. The Court of Claims awarded damages above the maximum prices fixed by the Office of Price Administration for such products and measured by what that court deemed the replacement cost of the requisitioned property. 107 Ct. Cl. 155, 67 F. Supp. 1017. The implications of this ruling reach far, and so we brought the case here. 330 U. S. 814.

While the immediate facts of this controversy are few and undisputed, they can be understood only in connection with the recognized facts in the meat industry. Of these we must take judicial notice inasmuch as we must translate the idiom of the industry into vernacular English. Also, of course, we must consider the facts in the context of the rather intricate system of meat price regulation by O. P. A.

The respondent was engaged in the business of packing pork products in Philadelphia. It bought hogs in Chicago, St. Louis, and Indianapolis and transported them to Philadelphia where they were slaughtered and converted into various pork cuts and products. It sold these products to retail dealers in Philadelphia, and it had also supplied pork products to Government agencies.

On January 30, 1942, the President approved the Emergency Price Control Act. 56 Stat. 23, 50 U. S. C. App. § 901. Accordingly, the Price Administrator, by a series of regulations, established maximum prices for dressed hogs and wholesale pork cuts. Revised Maximum Price Regulation No. 148, issued on October 22, 1942, governed the pork cuts here involved. 7 Fed. Reg. 8609, 8948, 9005; 8 Fed. Reg. 544.

To meet the food needs entailed by the war, the President under the authority of the Second War Powers Act, 56 Stat. 176, 50 U. S. C. Supp. V, § 633, created the Food Distribution Administration, with the Secretary of Agriculture as its head. E. O. 9280, 7 Fed. Reg. 10179. This Administration was given authority to assign food priorities, to "allocate" food to governmental agencies and for private account, and to assist in carrying out the program of the Lend-Lease Act of March 11, 1941, 55 Stat. 31. To carry out the task thus delegated by the President, the Food Distribution Administration issued to each packer operating under federal inspection a priority order calling for delivery of a proportionate part of the total quantity needed at the particular time.[1] A packer's quota was based on the ratio of meat produced in his plant to the total production in all federally inspected plants.

In conformity with this system, the respondent, on February 2, 1943, was requested to deliver 225,000 pounds of lard and pork products to the Federal Surplus Commodity Corporation for delivery under the Lend-Lease program.

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[1] In 1943 there were 308 hog slaughterers whose establishments operated under federal inspection. Livestock, Meats, and Wool Market Statistics and Related Data 1945, compiled by the Livestock Branch, Production and Marketing Administration, United States Department of Agriculture, p. 31. In 1942 there had been only 218 hog slaughtering establishments under federal inspection, and in 1944 there were 322. *Ibid.*

The respondent was advised that this order was to be filled in preference to any other order or contract of lower priority, and at the applicable O. P. A. ceiling prices. Insisting that it could no longer afford to sell to the Government at ceiling prices, respondent refused to make delivery.

On March 1, 1943, the Food Distribution Administration, exercising powers not questioned, issued an order requisitioning the lard and pork products in controversy.[2] On March 3, 1943, the property was duly seized in respondent's Philadelphia packing house. On March 24, 1943, respondent filed its claim with the Administration for "just compensation" for taking this property. Its total claim was $55,525, of which $16,250 was for lard and $39,275 for pork cuts. On May 7, 1943, the Administration, by way of preliminary determination of the just compensation for the requisitioned property, fixed the value of the lard at $15,543.78 and the pork cuts at $25,112.50. These amounts were based on the O. P. A. ceiling prices applicable to these products. On May 22, 1943, the preliminary award was made final. Respondent accepted in full payment the award as to the lard; it refused to accept the determination as to the pork cuts and, in accordance with the statutory procedure in the case of rejection of such an award, was paid half of it. On June 24, 1943, respondent instituted this action in the Court of Claims to recover the additional amount which when added to the $12,556.25, the half of the Government's valuation for those cuts, would constitute "just compensation" for what the Government had taken.

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[2] The requisitioned property consisted of the following:

40,000 pounds Cured Regular Hams, 14 to 18 lb. range
40,000 pounds Cured Clear Bellies, 10 to 14 lb. range
15,000 pounds Cured Picnics, 6 to 10 lb. range
30,000 pounds Salted Fatbacks, 8 to 12 lb. range
100,000 pounds Refined Pure Lard, 1 lb. prints (30 lbs. to carton)

The Court of Claims referred the proceeding to a commissioner, who took evidence and reported to the court. Upon the basis of his report and the underlying evidence, the Court of Claims found as a fact that the replacement cost of the requisitioned pork cuts at the time and place of the taking was $30,293, and concluded, as a matter of law, that such replacement cost and not the maximum ceiling price was the proper measure of damages for the taking. We heard argument at the last Term, and after due consideration deemed it appropriate to order reargument at this Term.[3]

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[3] After the case was taken under advisement, following reargument, a matter was brought to our attention which calls for consideration, however summary. We were advised that on March 23, 1943, the respondent filed with the O. P. A. an "Application for Adjustment of Maximum Prices for Commodities or Services under Government Contracts or Subcontracts," pursuant to Procedural Regulation No. 6, 7 Fed. Reg. 5087, and Supplementary Order No. 9, 7 Fed. Reg. 5444. (See 7 Fed. Reg. 5088 for the form of the application.) The purpose of these regulations was to afford opportunity for relief to sellers who had made, or proposed to make, "contracts or subcontracts" with the Government. This application had lain dormant from the date of its filing until December 13, 1947, when we were advised by counsel for the Government that it was now in the files of the Reconstruction Finance Corporation, which is third in the chain of title from the O. P. A., through the Office of Temporary Controls, charged with the administration of these two regulations. On December 15, 1947, counsel for the respondent advised the R. F. C. that it withdrew the application insofar as it pertained to the requisitioned commodities in controversy here.

While the Government does not suggest that the dormancy of this application renders present proceedings, if not moot, premature, such apparently is the intimation. If the regulations in fact authorized one who is not a "contractor or subcontractor" in the ordinary meaning of those terms to obtain special administrative relief apart from the statutory scheme relating to requisitioned property, technical issues would have to be faced which we need not particularize. Counsel for the Government advise us that a counsel for the R. F. C. has now interpreted the regulations not only (1) as applicable to requi-

At the outset it is important to make clear what it is we are called upon to decide. The conventional criterion for determining what is "just compensation" for private property taken for public use is what it would bring in the free, open market. *E. g., Olson* v. *United States,* 292 U. S. 246, 255; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *L. Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340. But there must be a market to make the criterion available. Here there was a market in which the respondent could have sold the pork cuts, but it was not a free and open market; it was controlled in its vital feature, selling price, by the O. P. A. It is this

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sitioned commodities, but (2) as authorising retroactive price adjustments for requisition transactions completed before readjustment is sought. Not unnaturally, the Government states that the applicability of this procedure for readjustment "to requisitioned commodities may not be readily apparent from its terms." While normally we accept the construction placed upon a regulation by those charged with its administration, we must reject a construction that is not only as unnatural as what is now proposed but comes to us *post litem motam* five years after the application. It should also be pointed out that the construction now placed upon the regulations is not made by the administration that promulgated it but by the second successor agency for liquidating what is left of this administration. With due regard for the respect we owe to administrative rulings in their normal setting, it would require such a remaking of the regulations as reason and fair dealing here reject. The provisions for readjustment of contracts relate to a transaction in which the seller and the purchasing agency of the Government were in agreement as to the contract price. The price was paid, subject to the approval of the application for adjustment. If so approved, the seller retained the purchase price; if disapproved, the seller had to make a refund. See *Armour & Co.* v. *Brown,* 137 F. 2d 233, 240. In the case of a requisitioned commodity, certainly prior to the filing of an application, no amount is agreed upon, and no provision for refund has been made. In short, we reject this belated and novel construction and are of the opinion that the pendency of this moribund application before the R. F. C., now withdrawn by the respondent, was no bar to this suit.

fact that creates the problem of the case, assuming that the case is not dogmatically disposed of by holding that inasmuch as the maximum price is the only price which respondent could legally have got for its goods it is just compensation. We are not passing on the abstract question whether a lawfully established maximum price is the proper measure of "just compensation" whenever property is taken for public use. We are adjudicating only the precise issues that emerge from this case.

The Second War Powers Act, 1942, under which respondent's property was authorized to be taken, restricted compensation for the taking to that which the Fifth Amendment enjoins. 56 Stat. 176, 181. In enforcing this constitutional requirement "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *McGovern* v. *New York,* 229 U. S. 363. Respondent's sole claim is for the pecuniary equivalent of the property taken. This is not a situation where consequential damages, in any appropriate sense of the term, are urged as a necessary part of just compensation. Respondent does not claim such damages on the theory that, in order to protect its good will, it had to supply its regular customers and that this compelled replacement of the requisitioned pork products by the purchase, slaughter, and processing of live hogs.[4] Cf. *United States* v. *General Motors Corp.,* 323 U. S. 373, 382; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377–78; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–82. Respondent claims that replacement cost is the proper measure of the value of the property when requisitioned.

[4] If the respondent had sold the pork products in controversy here to its regular customers, it would have done so at the applicable ceiling prices. If the Government had then requisitioned the property from these customers, there would have been no question that the ceiling prices would have been the measure of just compensation.

This action was brought to recover damages which the respondent would suffer, so it maintains, if it accepted the Government's offer of the applicable ceiling prices in satisfaction of "just compensation." The burden therefore rests on the respondent to prove the damages it would suffer by not receiving more than the ceiling prices. *Marion & Rye Valley R. Co.* v. *United States*, 270 U. S. 280, 285.

The Court of Claims found that the principal item in the cost of processing respondent's products was what it had to pay for live hogs; that, inasmuch as live hogs were not then covered by price regulation, the Chicago market quotations governed price in the packing industry; that the Chicago average live hog price was $15.59 during March 1943;[5] and that, on the basis of this price, the replacement cost for the requisitioned property was $30,293. We are of opinion that in reaching this conclusion the court below failed to take into account decisive factors for the proper disposition of the action brought by the respondent.

We are dealing with a claim for damages arising out of a transaction pertaining to a particular industry, and the transaction cannot be torn from the context of that industry. It is practically a postulate of the slaughtering

[5] This was obviously not the cost of the hogs from which the pork products requisitioned by the order of March 1, 1943, were processed. The relevant hogs were purchased in some previous month and at a lower cost. The Chicago average was $15.35 in February and $14.78 in January, 1943, and $14.01 in December and $13.96 in November, 1942. Livestock, Meats, and Wool Market Statistics and Related Data 1945, compiled by the Livestock Branch, Production and Marketing Administration, United States Department of Agriculture, p. 54. Moreover, these were the average prices for average weights of hogs. *Ibid.* The Government took specific pork products which were processed from hogs of a definite weight for which the respondent paid specific prices in the Chicago, St. Louis, or Indianapolis markets.

industry that replacement cost does not afford a relevant basis for determining the true value of the industry's products. "Manufacturing operations in the meat packing industry do not consist of assembling raw materials for the purpose of obtaining one finished product, but rather of separating or breaking down raw materials (cattle, etc.) into many parts, one of which (dressed carcass) is the major product, and the other parts of which are further processed into numerous byproducts." *Kingan & Co.* v. *Bowles*, 144 F. 2d 253, 254. In consequence, cost in the industry generally is like a fagot that cannot be broken up into simple, isolated pieces. See Greer, Packinghouse Accounting (Prepared by the Committee on Accounting of the Institute of American Meat Packers), *passim*. "The accounting procedure in the hog business is even more complicated than that of the cattle, calf, or sheep business, because the operations involve a greater breaking up of the dressed carcass and more numerous processes extending over considerable periods of time." *Id.* at 33–34. The problem is one of "joint cost" in a business which "produces no single major product," *id.* at 213, with the result that no accountant has thus far "been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork." Hamilton, *Cost as a Standard for Price*, 4 Law and Contemp. Prob. 321, 328; cf. Greenbaum, *The Basis of Property Shall Be the Cost of Such Property: How is Cost Defined?*, 3 Tax L. Rev. 351, 356–59.

If, as suggested in argument, a hog were nothing but an articulated pork chop, and the processing of edible and inedible by-products were not characteristic of the industry, the price of a live hog might well represent the collective cost of the derivative pork cuts. The pork chop, however, is but one of the many edible hog products. According to an estimate about the time of the requisitioning of these pork cuts, there were more than 200 pork

items (exclusive of sausage products) in the market. See Supplementary Statement of Considerations for Revised Regulation No. 148, Pike and Fisher, 3 OPA Food Desk Book 46,151. "Most pork products," the Administrator found, "are consumed in a cured or processed state. Fresh pork products, such as pork chops and fresh ham, represent not over 20 per cent of the vast quantity of pork which moves by rail. The remaining 80 per cent reaches the consumer in a wide variety of processed forms, including dry, dry cured, sweet pickled, smoked, cooked, baked and canned." *Id.* at 46,141. It deserves noting that the requisitioned products in controversy included cured regular hams, cured clear bellies, cured picnics, and salted fatbacks.

The petitioner was also engaged in by-product processing,[6] for the Government took from him 100,000 pounds of refined pure lard. For the value of the lard the respondent accepted the administrative award.[7] Admittedly, part of the cost of the live hog must be charged to by-products. However, any method of apportioning the total cost to the by-products is highly speculative.[8]

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[6] There are "numerous by-products," and the computation of the values for "such by-products as casings, grease, fertilizer, and hog hair, is rather complex." Greer, Packinghouse Accounting (Prepared by the Committee on Accounting of the Institute of American Meat Packers) (1929) at 213 and 219, respectively; see, generally, Clemen, By-Products in the Packing Industry (1929); Moulton and Lewis, Meat through the Microscope (rev. ed. 1940); Readings on By-Products of the Meat Packing Industry, collected by the Institute of Meat Packing, University of Chicago (1941); Rhoades, Merchandising Packinghouse Products, Institute of Meat Packing, University of Chicago (1929); Tolman, Packing-House Industries (1922).

[7] Since, as we hold, the value of the individual products can only be determined by proportionate allocation from the overall operations, it seems to us that respondent's acceptance of the award as to the lard was hardly consistent with its rejection of the award as to the other pork products.

[8] "On much of the material transferred [from one of the slaughterer's departmental accounts to another], such as blood, bones,

Since so much speculative approximation and guesswork entered into the determination of cost, selling price, and profit, the industry, naturally enough, was in almost continuous controversy with the Price Administrator about them. The respondent was party to these controversies. On July 17, 1942, it filed a protest against Maximum Price Regulation No. 148 which was consolidated with the protest of 115 other pork slaughterers against this regulation. On the basis of calculations as to the cut-out value or replacement cost of various pork cuts, the slaughterers contended that the regulation did not allow them sufficient operating margin over the cost of live hogs. In rejecting the protest, on April 23, 1943, the Administrator made this ruling: "The interdependence of all phases of the operations of packing establishments makes precise evaluation of the relationship between prices on dressed and processed meats and live hog prices impossible except in terms of the over-all financial position of the industry." *In the Matter of Rapides Packing Co.*, Pike and Fisher, 1 OPA Opinions and Decisions 243. The respondent, on March 8, 1943, had also protested, again on the basis of the cost of live hogs, against the revision of the regulation. This protest was

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tankage, glue stock, etc., there is no ascertainable outside market, and the packers must perforce place quite arbitrary valuations on this material having no probable relation to either cost or market. Again certain products are in the green stage when transferred, and an outside market only obtains for the finished stage, with the result that arbitrary deductions must be made from the finished market, estimated to establish a nonexistent 'green' market. The certification of internal transfer prices presents, accordingly, an almost interminable problem to any outside reviewing body." Report of the Federal Trade Commission on the Meat-Packing Industry (1920), Part V, 56. The industry's position as to the utilization of such cost allocations and the Price Administrator's objections thereto are quoted fully and discussed in *Armour & Co.* v. *Bowles*, 148 F. 2d 529, 535–39.

consolidated with those of 15 other pork slaughterers and, substantially on the ground taken in the *Rapides Packing Co.* case, this second protest was likewise rejected by the Administrator. *In the Matter of Greenwood Packing Plant,* Pike and Fisher, 1 OPA Opinions and Decisions 296, 299.

Review by the Emergency Court of Appeals was not sought,[9] although the first denial of respondent's claim for the replacement cost of pork cuts, based on live hog prices, came shortly after the Government's requisitioning of the products as to which he now makes the same contention. It is noteworthy that the pork price margins were almost the only meat price margins which were not challenged before the Emergency Court of Appeals in what has been called "the battle of the meat regulations." See Hyman and Nathanson, *Judicial Review of Price Control: The Battle of the Meat Regulations,* 42 Ill. L. Rev. 584.

The considerations which underlay the Administrator's meat price determinations are most pertinent to the solution of our immediate problem. The result of his analysis was that the profit and loss data on a slaughterer's entire operations were the only dependable figures from which the fairness of meat prices could be deduced. The Administrator pointed out that the industry, on the basis of its accounting figures, had historically lost money on its meat sales.[10] Since, however, by taking the by-product

[9] It is also significant that none of the other 130 protestants sought review in the Emergency Court of Appeals. Cf., *e. g., Kingan & Co.* v. *Bowles,* 144 F. 2d 253, and *Armour & Co.* v. *Bowles,* 148 F. 2d 529, for that court's views on replacement cost as a basis for the determination of value.

[10] "It is a notable fact, that, according to the present method of departmental accounting, the packers are in the habit of showing low profits or even positive losses in the carcass-meat departments, while at the same time exhibiting large profits in the by-products or

sales into full account its operations as a whole were highly profitable, these meat sale losses were "more in the nature of bookkeeping losses which failed to take fully into account the integrated nature of the industry." These views were approvingly quoted by the Emergency Court of Appeals in *Armour & Co.* v. *Bowles*, 148 F. 2d 529, 535.

In both of the consolidated proceedings to which the respondent was a party, the Administrator explicitly requested to be furnished with the industry's profit and loss data. In the earlier proceeding, no proof of loss was filed by any of the protestants. *In the Matter of Rapides Packing Co., supra.* In the second proceeding the Administrator made this finding:

> "The three Protestants who submitted further evidence did not even thus sustain their claims of individual hardship. One of them showed a net profit of $60,492.44 for the five months period ending March 27, 1942; another a net profit of $6,838.00 for the three months period ending April 1, 1943, and the third failed to submit a profit and loss statement and balance sheet although specifically requested to do so." *In the Matter of Greenwood Packing Plant, supra*, at 297.

Not merely does the industry generally seem to have prospered under price control,[11] but so did the respond-

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'specialty' departments, the chief reason for this somewhat extraordinary state of affairs being found in the valuations placed upon the transfers." Report of the Federal Trade Commission on the Meat-Packing Industry (1920), Part V, 56. While a great deal of time has passed since this 1920 report, the Price Administrator reached the same conclusions in 1943, and the Emergency Court of Appeals quoted the report more fully in 1945. See *Armour & Co.* v. *Bowles*, 148 F. 2d at 537.

[11] See War Profits Study No. 14, Office of Research, Financial Analysis Branch, Office of Price Administration, Office of Temporary Controls (1947) pp. 17, 45–47, 73–75. This is a study of the profits

ent[12] despite the fact that throughout the period in controversy it continued to buy live hogs at prevailing prices

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of 520 food processors, but the foregoing references were to the separate tabulations concerning the 79 meat packers included in the study. The financial data was compiled from Moody's Industrials, Standard & Poor's Corporation Records, and the OPA Financial Reports submitted by the packers. *Id.* at 19. Of the total 79 meat packers, 54 are processing slaughterers, 10 non-processing slaughterers, and 15 non-slaughterers. The comparison between the 1943 operations and the base period (1936–39 average) operations shows for the 54 processing slaughterers: *Net sales:* 1943—$4,575,528,000 (after renegotiation refunds)/base period—$2,382,211,000; *Profits before income taxes:* 1943—$125,463,000 (after renegotiation refunds)/base period—$24,415,000; *Profits after taxes:* 1943—$50,402,000 (after renegotiation refunds)/base period—$19,255,000; *Return on sales:* 1943—2.7%/base period—1.0%; *Return on net worth:* 1943—19.5%/base period—4.1%; *Return on invested capital:* 1943—16.5%/base period—4.1%. *Id.* at 45, 47. For the 10 non-processing slaughterers, the comparison shows: *Net sales:* 1943—$62,098,000/base period—$29,927,000; *Profits before income taxes:* 1943—$1,027,000/base period—$184,000; *Profits after taxes:* 1943—$390,000/base period—$147,000; *Return on sales:* 1943—1.7%/base period—.6%; *Return on net worth:* 1943—28.0%/base period—6.3%; *Return on invested capital:* 1943—25.5%/base period—5.9%. *Ibid.*

[12] Respondent's income account for the year ending December 31, 1943, shows:

"Net sales	$14,225,056	
Cost of sales	12,950,785	
Selling, etc., exp	809,770	
Operating profit	404,500	
Other income	18,717	
Total income	423,217	
Misc. deductions	13,229	
Income taxes	176,619	
Net income	233,369	
Earn., pfd. share		$40.21
Earn., com. share		17.97"

See Moody's Manual of Investments, American and Foreign, Industrial Securities, 1944, p. 647. The 1943 net income figure of $233,369 compared favorably with preceding years: 1942—$73,292; 1941—$150,069; 1940—$148,164; and 1939—*d$76,936.*

and to sell pork products derived from them at the authorized ceiling prices, even when this meant selling its pork products below the price that the Court of Claims found to be their replacement cost value.[13]

Most pertinent, therefore, are the pronouncements of the packing industry made before these matters became embroiled in price-fixing litigation. "The cost of a dressed hog carcass, or of a lot of dressed hog carcasses, may be determined quite satisfactorily; but when a carcass is cut up into its various merchantable parts, all record of cost is lost, as it is impossible to determine the cost of any of these cuts." Greer, Packinghouse Accounting (Prepared by the Committee on Accounting of the Institute of American Meat Packers), p. 246, and also pp. 43, 58, 61–62. Since the "results for the hog business as a whole can be found only by adding the profits or losses for all merchandising departments," *id.* at 218, the only accurate formula for costs in hog slaughtering is a profit and loss statement for the entire operations. *Id.* at 43–44.

It is as old as the common law that an allegation purporting to be one of fact but contradicted by common knowledge is not confessed by a demurrer.[14] Of course,

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[13] The court below found that in order to protect its good will and keep its organization intact, "Throughout the period mentioned [prior to and after the March 1943 requisition], plaintiff [respondent] continued to buy live hogs at prevailing prices and to sell pork products derived from them at the ceiling prices authorized by regulations of the Office of Price Administration, even when the cost of live hogs was greater than the wholesale prices of the products obtained from them." 67 F. Supp. at 1022.

[14] "If one enters my close, and with an iron sledge and bar breaks and displaces the stones on the land, being my chattels, and I request him to desist, and he refuses, and threatens me if I shall approach him; and upon this I, to prevent him from doing more damage to the stones, not daring to approach him, throw some stones at him *molliter et molli manu*, and they fall upon him *molliter*, still this is not a good

findings of fact are binding on this Court, but if this Court had to treat as the starting point for the determination of constitutional issues a spurious finding of "fact" contradicted by an adjudicated finding between the very parties to the instant controversy, constitutional adjudication would become a verbal game.

There are facts and facts, even in Court of Claims' litigation. It is the function of the Court of Claims to make findings. But when a judgment based on such findings is here brought in question it is the function of this Court to ascertain the meaning of the findings in order to determine their legal significance. The judgment of the court below that "replacement cost" is the proper measure of just compensation and the mode by which it reached the amount of that cost are inescapably enmeshed in considerations that are clearly familiar issues of law and particularly of constitutional law. Where the conclusion is a "composite of fact and law," *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668, this Court may certainly hold that as a matter of law the findings are erroneous. See, *e. g.*, *Washington ex rel. Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 528. Even when this Court reviews State court judgments involving constitutional issues it "must review independently the legal issues and those factual issues with which they are commingled." See *Oyama* v. *California*, 332 U. S. 633, 636 (and the authorities therein cited). Similarly, findings concurred in by two courts do not control the decision here where "facts and their constitutional significance are too closely connected" and "the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied."

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justification, for the judges say that one cannot throw stones *molliter*, although it were confessed by a demurrer. . . ." *Cole* v. *Maunder*, 2 Roll. Abr. 548 (K. B. 1635) (as translated from the Norman French in Ames, Cases on Pleading (1875) 2).

United States v. *Appalachian Electric Power Co.*, 311 U. S. 377, 403. Even where the parties to the litigation have stipulated as to the "facts," this Court will disregard the stipulation, accepted and applied by the courts below, if the stipulation obviously forecloses real questions of law. See, *e. g.*, *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281.

The prior proceedings between the same parties, as to which we would be blind not to take judicial notice, as well as the unquestioned facts pertaining to the meat industry are relevant to interpret the findings of the Court of Claims. We have concluded that here "replacement cost" is a spurious, i. *e.* non-legal, basis for determining just compensation. It is as though the Court of Claims had based its opinion on a balance sheet and we had to interpret the balance sheet into actualities. And so we hold that, as a matter of law, the court below erred in utilizing replacement cost as the basis for determining what constituted just compensation.

When due regard is given to the findings of the Court of Claims, they fail to establish that the compensation proffered by the Government for the requisitioned pork cuts, based on the maximum ceiling prices, falls short of "just compensation." We are therefore not called upon to consider whether as a matter of constitutional law prices fixed by the Government for the sale of commodities are the measure of "just compensation" for commodities seized by the Government. As the conflict of opinion here indicates, that is a debatable issue which, since we can, we must avoid adjudicating. See *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105.

The burden of proving its case was upon the respondent. The nature of this burden was to prove, in light of the governing facts of the industry, that the administrative award for the taking of respondent's property was less than just compensation, based as it was on prices

which the Administrator had established for those products and which had been left undisturbed by the process devised by Congress for assuring the fairness of these prices. By evidence merely of bookkeeping losses, respondent did not carry its burden of proving actual damage. Just compensation is a practical conception, a matter of fact and not of fiction. Respondent introduced no evidence, and the Court of Claims made no findings, to establish a loss based on its total operations during the period relevant to the slaughtering of the hogs from which the requisitioned products were processed.[15] On

[15] The court below found that the $25,112.50 award was the equivalent of the ceiling price of the requisitioned property when sold at wholesale in carload quantities at Philadelphia on March 3, 1943, the date the Government took possession and title; that the respondent customarily sold its products at wholesale but in lots of less than 500 pounds each and that it made delivery to its customers by means of 57 route trucks; that the ceiling price if the requisitioned property had been sold in this customary manner would have been $26,362.50; that the difference between the two ceiling price figures resulted from the $1 per cwt. deduction established by the price regulation for sales in carload quantities; and that the "$1.00 differential was intended to partially defray the expense incurred for delivery and sale in less than carload quantities." 67 F. Supp. at 1022. Respondent did not challenge the reasonableness of the $1 differential in its petition filed with the court below.* Respondent argues here, however, that the effect of the differential is to reduce the return it would have netted if it had been allowed to sell the requisitioned products in small quantities. But, bearing in mind that this is a suit for actual damages, the argument has a fatal weakness. If the respondent had sold in smaller quantities at the higher ceiling price and made delivery by truck, it would have incurred all of the expenses that motivated the differential—invoicing, billing, handling, and transportation. None of these expenses was incurred when the Government requisitioned the pork products. The "loss" in the gross sales figures would have been counterbalanced, to some extent at least, by the additional expenditures. Cf. *Superior Packing Co.* v. *Clark*, 164 F. 2d 343, 347–48. All this bears on the guiding consideration that recovery in this action must be related to proof of actual loss.

the basis of such figures it would be necessary to determine by reasonable allocations the portion of the loss properly attributable to the goods seized by the Government. In the proceedings below the respondent neither alleged such a loss nor submitted proof in support of it. Since it has not maintained its burden of proving that the ceiling price award entails damages, the judgment of the Court of Claims cannot stand.

The judgment is reversed with directions to the Court of Claims to enter a judgment for the respondent in an amount not exceeding $12,556.25, with interest on the amount of $25,112.50 from March 3, 1943, the date of the requisition, to May 22, 1943, the date of the final award made by the Director of the Food Distribution Administration.

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1947.

The United States, Petitioner, v. John J. Felin & Co., Inc. } On Writ of Certiorari to the Court of Claims.

[June 14, 1948.]

Mr. Justice Reed, with whom Mr. Justice Black and Mr. Justice Murphy join, concurring in the judgment.

I agree with the disposition of this case made by Justice Frankfurter's opinion. However, I cannot concur in the reasoning by which that result is reached. That opinion holds that the respondent is not entitled to recover as "just compensation" anything in addition to the ceiling price unless it can "establish a loss based on its total operations during the period relevant to the slaughtering of the hogs from which the requisitioned products were processed" and "determine by reasonable allocations the portion of the loss properly attributable to the goods seized by the Government." Why a loss on total operations must be established in order to show the loss on the hog products requisitioned by the Government is not clear to me. It is the market value of any product that is the basis for "just compensation." If there is no real market value, cost may be an element in the determination of value. Under the circumstances of this case, any other value than the ceiling price is illusory. Consequently I believe that whenever perishable property is taken for public use under controlled-market conditions, the constitutionally established maximum price is the only proper standard of "just compensation."

Five members of this Court express their agreement that replacement cost, if relevant, has been properly found by the Court of Claims. If replacement cost, determined by any accounting system, is a factor, the evidence on

which the Court of Claims based its findings of that cost is not before us, and therefore those findings cannot be properly regarded as unsatisfactory. Even if we assume that the evidence offered did not properly allocate costs, the Government raised no such issue by its petition for certiorari or in its brief. The record does show a finding of replacement cost based upon some evidence. In the absence of that evidence from the record, it must be assumed that it would support the findings. If we assume that replacement cost is relevant, to say that a manufacturer who proves that cost by the results of his own system of cost accounting may not retain his award because a more accurate accounting system exists, though not offered in evidence, disregards the salutary rule that litigants in civil matters must be allowed to frame their issues and prove their cases in trial courts as each desires. This principle includes the introduction of such relevant evidence as each wishes to introduce. Often proof of value or damages is difficult. Courts then reach conclusions from the relevant evidence presented. *Palmer* v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544; *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251. Findings are properly made on the basis of the relevant evidence heard and are not subject to attack because other available evidence might have been produced. The suggestion of JUSTICE FRANKFURTER'S opinion as to a better method for determining replacement cost is futile, since it furnishes a rule, rejected by the majority of this Court, for the Court of Claims to use in determining just compensation. The approval of the method of determining replacement cost used by the Court of Claims by a majority of this Court logically requires a decision on whether or not the ceiling price represents "just compensation."

It may be assumed that the respondent cannot replace the requisitioned hog products at the ceiling price. If

respondent was impelled to replace the requisitioned products in its stock, its reasons for so doing lay in the realm of business judgment. There was no legal compulsion. It acted to keep its line of goods complete, to serve its customers and to preserve its good will. Any additional cost to the respondent caused by replacing the products was a consequential damage for which compensation is not given in federal condemnation proceedings. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 382.

It has been long established that in a free market the market price is the proper criterion for determining "just compensation." *Olson* v. *United States*, 292 U. S. 246, 255; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123. In *Vogelstein & Co.* v. *United States*, 262 U. S. 337, this Court held that the prevailing price in a controlled market was "just compensation." The Vogelstein Company was a wholesaler of refined copper. Between September 28, 1917, and February 1, 1918, the United States requisitioned from the Company 12,542,857 pounds of copper for which it paid 23.5¢ per pound. But this price was not the result of the interplay of supply and demand on a free and open market; it was a price fixed by an agreement made by the War Industries Board with copper producers and approved by the President on September 21, 1917. Vogelstein Company, although not a producer, had apparently cooperated with the producers in the establishment and maintenance of the 23.5¢ price. The Company argued that it was entitled to 26.8¢ per pound—the average cost to it of the copper requisitioned by the United States. This Court concluded that paying the fixed 23.5¢ was correct. "The market price was paid. The market value of the copper taken at the time it was taken measures the owner's compensation." 262 U. S. at 340. Consequently, the judgment of the Court of Claims dismissing the company's petition was affirmed.

This acceptance of the fixed price as the market value closely approaches the situation now presented.

It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their perishable property to the general public at a fixed price or not to sell to anyone [1] and later to hold that the Government must pay a higher price than the general public where it requisitions the perishable property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of "just compensation." That lawfully fixed market price determines what the perishable article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain since consequential damages for loss of good will cannot be obtained. Such maximum price is "just compensation." [2]

If the Government fixed prices with the predominant purpose of acquiring property affected by its order, a different situation would be presented. Here we have price regulation of meat products on a national scale with judicial review of those regulations. The Government sought for itself no unique opportunity to purchase.

The respondent, as JUSTICE FRANKFURTER'S opinion points out, filed several protests against the Maximum

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[1] See *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503.

[2] Cf. *Nortz* v. *United States*, 294 U. S. 317, 328–29.

Price Regulations controlling the ceiling prices of hog products. These protests were rejected by the Administrator and review by the Emergency Court of Appeals was not sought. It was during the course of these proceedings that evidence of the profit and loss of the industry and of the replacement cost of pork products could properly be introduced. However, once the maximum price had been set and had not been set aside by direct attack, that price became the only relevant measure of just compensation. Whether normally admissible or not,[3] the replacement cost of perishable articles then subject to price control, bought to maintain the good will of a business, cannot be an element in the determination of value to fix just compensation. Therefore, evidence of replacement cost in condemnation proceedings such as that before the Court today is irrelevant and should not be admitted.

[3] See Orgel, Valuation Under Eminent Domain (1936) 586.

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1947.

The United States, Petitioner, v. John J. Felin & Co., Inc. } On Writ of Certiorari to the Court of Claims.

[June 14, 1948.]

Mr. Justice Rutledge, concurring.

Six members of the Court agree that the judgment of the Court of Claims must be reversed, but are equally divided in their groundings. Since I am in partial agreement with both groups, I state my own conclusions independently.

It may be, as my brother Reed and those who join with him think, that the ceiling price in a wartime controlled market should furnish the measure of constitutional just compensation for property of a highly perishable nature taken. Perhaps also this view should be qualified further, as by some limitation which would make adjustments beyond that price permissible when the circumstances of the taking are such that they would entail destruction of property values beyond those inherent merely in the property which the Government receives and uses.[1]

But I am also in agreement with my brother Frankfurter and those who concur with him that it is not

[1] In some situations the Court has allowed compensation for the destruction of property as being equivalent to "taking" it, cf., *e. g.*, *United States* v. *Welch*, 217 U. S. 333; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546; *United States* v. *General Motors Corp.*, 323 U. S. 373, 384; in others apparently what amounted in effect to destruction has been regarded as infliction of consequential injuries and thus as not compensable, cf. *e. g.*, *Bothwell* v. *United States*, 254 U. S. 231; *Mitchell* v. *United States*, 267 U. S. 341.

necessary to reach these important constitutional issues in this case. For I think that, with reference to such perishable commodities taken under circumstances like these, the legal market or ceiling price furnishes at least presumptively the measure of just compensation, and that this measure should apply unless and until the owner sustains the burden of proving that he has sustained some loss for which he is entitled to a greater award.

That burden, I also agree, the respondent has not sustained in this case. The Court of Claims awarded respondent its "replacement costs," in the view that "when property is taken the owner must be put in as good position pecuniarily as he was in before his property was taken."[2] Payment of the ceiling price did not do this, since as the court pointed out respondent "felt obliged to furnish its customers a certain amount of products, although at a loss, in order to retain their good will and . . . hold its organization together."[3] For this reason it became necessary for respondent to go into the market and purchase live hogs and process them, paying a higher price than it had paid for the hogs from which the products taken had been processed. In this way respondent incurred a loss it would not have incurred had those products not been taken.

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[2] 107 Ct. Cl. 155, 165. For this grounding the court relied upon citation of *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 125; *United States* v. *Miller*, 317 U. S. 369, 374; *Walker* v. *United States*, 105 Ct. Cl. 553. The quoted statement, of course, taken abstractly, is broad enough to permit the award of consequential damages, an effect contrary to this Court's consistent rulings. See the authorities cited in note 4.

[3] 107 Ct. Cl. 155, 165. The record before us contains no proof that replacing the requisitioned goods was essential to prevent respondent from going out of business or that the loss of good will entailed by the taking, if not repaired by replacement, would have prevented continued employment of respondent's employees or disrupted its organization.

On this basis, I agree with MR. JUSTICE REED that the loss is one for consequential damages. That is, it is one to compensate for loss incurred to preserve unimpaired respondent's good will,[4] not to compensate for any value lawfully obtainable for the articles then or prospectively within any reasonable future period, in view of the property's perishable nature, from other sources.

But respondent asserts its claim to "replacement value" on a different theoretical basis, *i. e.*, not as compensation for loss incurred in preserving good will, but as the proper measure of the value of the property when requisitioned. And if market price, here ceiling price, is not the measure of compensation, it is said "replacement cost" furnishes the best substitute or at any rate an appropriate element for consideration.

The difference in the present circumstances would seem to be highly verbal. For in any event the loss was actually incurred for the purpose of keeping respondent's customers satisfied and thus preserving its good will unimpaired; in other words, to prevent the accrual of injury consequential to the taking.

It is true that in circumstances where there is no market value, "replacement cost" has been held appropriate for consideration in reaching a judgment concerning the value which is just compensation. But this seems to me a different thing from allowing such proof, when the loss it reflects has been incurred solely to prevent consequential injury, and there is a market value presumptively valid to compensate for all losses incurred except that loss. To allow that proof in these circumstances would be in substance if not in form to be permitting an award for elements of consequential damages entirely out of line

[4] See *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378, and authorities cited; cf. *United States* v. *General Motors Corp.*, 323 U. S. 373, 383.

with the policy of this Court's prior decisions concerning compensation for such injuries.[5]

The considerations set forth by my brother FRANKFURTER respecting the difficulties, indeed the near impossibility, of proving costs in this case would seem to support this conclusion. Accordingly, I concur in the judgment of the Court.

[5] See authorities cited in note 4.

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1947.

The United States, Petitioner, v. John J. Felin & Co., Inc. } On Writ of Certiorari to the Court of Claims.

[June 14, 1948.]

Mr. Justice Jackson, with whom Mr. Justice Douglas joins, dissenting.

It would appear that this Court in this case is exceeding the limitation placed by Congress on its review of Court of Claims decisions. 28 U. S. C. § 288; 53 Stat. 752. The Court does not decide, as Congress has authorized it to do, that any finding of the Court of Claims is not supported by substantial evidence, or that the ultimate findings lack support in evidentiary findings, or that there has been a failure to make findings on the material issues. Instead, in effect it sets aside the judgment below on its own interpretation of "recognized facts in the meat industry." Of these it takes judicial notice on the basis of an assortment of publications which, whatever their merits if called to the attention of the court below, should not in this Court outweigh specific findings of fact by the Court of Claims based on evidence before it.

Taking the facts as found by the Court of Claims, the case is this: Claimant was a meat packer and among its products were pork chops. The Government set a maximum price at which pork chops could be sold. It set no maximum price on the two principal factors in the cost of pork chops, *viz:* live hogs and labor. The result was that claimant's uncontrolled costs mounted until, on what is found to be a fair allocation of costs between chops and other products of the hog, it was costing more to produce the pork chops than the price for which claim-

ant was permitted to sell them. But there were certain collateral benefits derived from supplying old patrons, even at a loss, to avoid heavier losses from shutting down the business and to keep customer good will for the hoped-for day of normal business.

However, the Government decided to buy claimants' chops. It offered the maximum OPA price. As there was no such compensating advantage to the packer in selling its choice cuts to the Government at a loss, as in keeping its business going with its general customers, it refused the offer. The Government then seized its pork chops and the company now claims the "just compensation" which the Constitution guarantees to those whose private property is taken for public use. The Government contends, and the practical effect of the Court's holding is, that the company can recover only the maximum price fixed for its products by the Office of Price Administration, in spite of the finding that this is less than it cost to produce or to replace them.

It is hard to see how just compensation can be the legal equivalent of a controlled price, unless a controlled price is also always required to equal just compensation. It never has been held that in regulating a commodity price the Government is bound to fix one that is adequately compensatory in the constitutional sense, so long as the owner is free to keep his property or to put it on the market as he chooses. If the Government were required to do so, the task of price regulation would be considerably, if not disastrously, complicated and retarded. It seems quite indispensable to the Government itself, for the long-range success of price controls, that fixed prices for voluntary sales be not identified with the just compensation due under the Constitution to one who is compelled to part with his property.

The war did not repeal or suspend the Fifth Amendment. *United States* v. *New River Collieries*, 262 U. S.

341, 343; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88. But it is obvious that the constitutional guaranty of just compensation for private property taken for public use becomes meaningless if the Government may first, under its "war powers," fix the market price and then make its controlled figure the measure of compensation.[1]

It must be remembered that market price, as such, is not controlling. The Fifth Amendment's "exact limitation on the power of the Government" [2] is not market price—it is just compensation. The former is relevant, and this Court has so considered it, only because, in a free market, it is perhaps the best key to value at the time of taking. Original cost and replacement cost yield to it only because of that factor. But here, there is no true market price [3] to provide the usually accepted stand-

[1] Such a rule hardly squares with the doctrine laid down by this Court more than fifty years ago that "the compensation must be a full and perfect equivalent for the property taken," *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 326, or later expressions that "the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken," *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 304; *Olson* v. *United States*, 292 U. S. 246; *United States* v. *Miller*, 317 U. S. 369.

[2] ". . . in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 325.

[3] The price approved as just compensation in *Vogelstein* v. *United States*, 262 U. S. 337, was fixed by agreement between the Government and the producers, represented by a committee whose members Vogelstein had nominated, and helped to elect, to represent the industry. Thus that price is not comparable to the Government-dictated price involved in this case. In the *Vogelstein* case, this Court said: "Appellant's contention that there was no market price other than that fixed by the fiat of the United States is without support . . ." 262 U. S. 339. And, further, "The finding of the Court of Claims is plain and cannot be read as referring to a mere fiat price." 262 U. S. 340.